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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 594

UNION PACIFIC RAILROAD COMPANY, A CORPORATION; CITY OF KANSAS CITY, KANSAS; DON C. MCCOMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, ETC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET. AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINIONS, AND PERMANENT INJUNCTION ENTERED BY THE DISTRICT COURT

STATEMENT

This volume contains the findings of fact, conclusions of law, opinions, and permanent injunction entered by the District Court. We have reprinted these portions of the record separately, primarily because the record references contained in

the findings of fact and in the opinion on the application for a temporary injunction, the principal opinion delivered by the court below, refer to pages of a record which, as incorporated in the printed record before this Court, has a different pagination. Accordingly, for the convenience of the Court, we have changed the record references made by the court below to conform to the pagination of the present record.

FINDINGS OF FACT

(Filed July 8, 1940)

Upon the hearing of this cause on the application of plaintiffs for a permanent injunction, from the record and the evidence introduced on said hearing, the Court finds the facts specifically which constitute the grounds of the action of the Court upon said application, as follows:

1

That this action is being prosecuted by the United States of America by its attorney for the Western District of Missouri, under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States[1] made by authority of the Act of Congress entitled "An Act to Regulate Commerce," as amended (49 U. S. C., Sec. 12, par. 1) and the Act of Congress entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" known as the "Elkins Act," as amended (U. S. C., Secs. 41–43). That the complaint charges that the defendants have violated and conspired to violate said Acts of Congress by offering, agreeing to give, giving, and soliciting, accepting and receiving rebates, conces-

[1] Ex. 52, R. 2426.

sions, advantages, and discriminations prohibited by said Act, and said complaint prays that said alleged violations of law be permanently enjoined.

2

That all of the defendants have been served with process.

3

That defendant Union Pacific Railroad Company is and at all times in question was a corporation and a common carrier by railroad in interstate and foreign commerce.[2]

4

That defendant City of Kansas City, Kansas, is and at all times in question was a municipal corporation and defendants Don C. McCombs,[3] George T. Darby,[4] Alton H. Skinner,[5] Howard Payne,[6] and Truman Schlup[7] are and at all times in question were officers of said defendant City; that defendant Francis Blake is and has been since April 7, 1939, an officer of said defendant City.[8]

5

That all of the remaining defendants, other than defendants DeOreo, Fean, and Ulmann, are and at

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[2] Ex. 48, R. 2356, and Separate Answer, R. 108.
[3] R. 879.
[4] R. 956.
[5] R. 741.
[6] R. 668.
[7] R. 1015.
[8] R. 1017.

all times in question were dealers in produce or perishable food products. That all of said defendant produce dealers are and at all times in question were shippers and consignees of shipments of produce or perishable foods by railroad in interstate commerce.[9]

6

That defendants Mallin Produce Company, Garrett-Holmes & Co., Inc., L. Yukon & Son, Michael Swanson & Brady Produce Co., H. Junsberg & Son Produce Co., Inc., H. Winer Produce Company, O. C. Evans Co., Market Fruit Company, and Lombardo Produce Company are and at all times in question were private corporations.[10]

7

That the cities of Kansas City, Missouri, and Kansas City, Kansas, are and at all times in question were a part of a district known as Greater Kansas City. That there is, and for eighty years has been, a produce district in Kansas City, Missouri, in which there are and have been dealers, at wholesale in produce or perishable food products;[11] that all of the various defendant produce dealers are or have been located in said Kansas City, Missouri,

[9] Ex. 16, R. 2037–2039; Ex. 47, R. 2349; and Separate Answers, R. 97, 100, 103, 105, 170, 178.

[10] Separate Answers, R. 97, 170, 105, 100.

[11] Ex. 2, R. 1487; Ex. 20, R. 2094; R. 1176; R. 1356.

produce district.[12] That said Kansas City, Missouri, produce district and defendant produce dealers and other produce dealers therein are and for many years have been served by numerous common carriers by railroad in interstate commerce, including defendant Union Pacific and plaintiff railroads.[13]

8

That there is at the present time a produce terminal in Kansas City, Kansas, on the public levee owned by defendant Kansas City, Kansas, known as the Kansas City Food Terminal. That said Kansas City Food Terminal consists of a market for wholesale produce businesses, and railroad tracks, yards, and facilities, composing a part of and serving said market and produce terminal. That said railroad facilities consist of a team track and inspection yard owned by defendant Union Pacific Railroad Company and certain so-called house tracks owned by the defendant City,[14] and are operated by defendant Union Pacific Railroad Company; and said market and produce terminal are and at all times have been served or reached by the tracks of no other railroad[15] except that Guy

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[12] Ex. 16, R. 2037–2039; and Separate Answers, R. 97, 100, 103–104, 105, 170, 178–179.

[13] Ex. 16, R. 2035–2039; R. 464, 549–550, 555–556, 593, 609, 711, 730, 731–732, 734–735, 724, 738–739; and Separate Answers, R. 97, 100, 103, 105, 169, 177.

[14] Ex. 232, R. 3055; R. 1097–1098, 1146–1147.

[15] R. 693, 700, 708.

A. Thompson, Trustee of the Missouri Pacific Railroad Company, jointly serves with the defendant Union Pacific Railroad Company the cold-storage plant forming part of the said terminal.[16] That the Kansas City Food Terminal is a unitary enterprise with the market facilities and railroad perishable yard as integral parts of a unified whole, and is the rail terminal for perishable produce traffic of defendant Union Pacific at Kansas City.[17] Similar terminals are owned and operated by railroads at Denver, Detroit, Cleveland, and Buffalo.[18]

9

That defendants DeOreo and Fean, for a number of years prior to 1937, had been engaged in promoting terminals with wholesale produce market and rail facilities in various cities,[19] and in December 1936 said defendants proposed to a traffic representative of the defendant Union Pacific at Cleveland, Ohio, the promotion of a perishable food terminal on the line of the Union Pacific at Greater Kansas City.[20] In January 1937 said defendants came to Kansas City for that purpose

[16] R. 867–868.

[17] Ex. 3, R. 1541; Ex. 14, R. 1997–1998; Ex. 47, R. 2349; Ex. 62–B, R. 2600–2605, 2606–2615, 2616–2624; Ex. 7, R. 1656–1657; Ex. 203, R. 3003; Ex. 232, R. 3055; Ex. 251, 3124; R. 1146–1147.

[18] Ex. 2, R. 1495, 1497–1498, 1512–1515; R. 613–614, 630, 1101–1102, 1144.

[19] Ex. 2, R. 1493–1496, 1497–1498; Ex. 6, R. 1610–1612.

[20] Ex. 2, R. 1484–1489.

and entered into arrangements with officers of the Union Pacific for the promotion of such a terminal on the Public Levee of Kansas City, Kansas, a point served by the railroad of the Union Pacific.[21]

10

That in December 1936 and January 1937 the defendant Union Pacific and its officials, for the purpose of increasing the volume of its railroad traffic and revenues from perishable food products, formed a plan to finance the said terminal through the defendant City of Kansas City, Kansas, and the Public Works Administration of the United States, and to have the market buildings owned by said City in order that they might be constructed in part with a grant of Public Works Administration funds, and that when completed they might be free from taxation so that space in them might be rented to produce dealers who are shippers in interstate commerce, at low rentals, in order to give them an advantage over other shippers engaged in interstate commerce who are required to pay rentals or bear capital costs upon the full investment in the buildings employed in the conduct of their business.[22]

11

That defendant Union Pacific procured from engineers plans and estimates for such a food

[21] Ex. 2, R. 1489, 1489–1490, 1496–1499.
[22] Ex. 2, R. 1490–1492, 1496–1497, 1498–1499.

terminal,[23] and negotiated with and succeeded in interesting defendant Kansas City, Kansas, and defendant officials of said city, in the promotion of such food terminal.[24] That since on or about January 1, 1937, defendant Union Pacific, defendant Kansas City, Kansas, defendant officials of said City, defendants DeOreo and Fean, and other persons and corporations, have engaged in promoting, financing, building and completing such terminal, and said efforts and activities have resulted in the construction of the buildings and facilities heretofore mentioned known as the Kansas City Food Terminal, located on the Public Levee of Kansas City, Kansas, and reached and served exclusively by the rails and tracks of defendant Union Pacific Railroad Company.

12

That in the promotion and financing of said food terminal the defendant Union Pacific has participated jointly with the defendant City of Kansas City, Kansas, and has taken a leading and dominant part. That defendant Union Pacific originated the plan that the terminal be financed by: (1) Revenue bonds of defendant Kansas City, Kansas, secured only by revenue from the terminal and from rentals derived from other levee property; and (2) a P. W. A. grant from the United States to said City.[25] That defendant Union Pa-

[23] Ex. 2, R. 1503; Ex. 62–A, R. 2481.

[24] Ex. 2, R. 1500, 1509–1510; Ex. 13, R. 1790–1791.

[25] Ex. 2, R. 1490–1491, 1498–1499, 1520–1521, 1532; Ex. 62–A, R. 2481–2483; Ex. 62–B, R. 2557–2576.

cific assisted in obtaining passage of state legislation [26] for the sale of such revenue bonds and assisted in obtaining a P. W. A. grant; [27] [28] sought a purchaser for said revenue bonds, [29] and failing to secure a purchaser bought said bonds itself in the amount of $3,000,000; [30] jointly with the City supervised the construction of the terminal; [31] sought and secured a tenant for the cold-storage facilities of the terminal; [32] from time to time advanced funds

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[26] Ex. 2, R. 1498–1499, 1501, 1502, 1503, 1504–1505, 1505–1506, 1506, 1521; Ex. 13, R. 1792–1793, 1797; R. 832, 834–835.

[27] [28] Ex. 2, R. 1520–1521, 1522–1523, 1532–1533; Ex. 4, R. 1568–1569, 1572–1573; Ex. 5, R. 1598–1599, 1599–1600; Ex. 6, R. 1607–1608, 1621–1622, 1623–1624; Ex. 12, R. 1765; Ex. 28, R. 2195–2196, 2197; Ex. 6, R. 1625; Ex. 31, R. 2233.

[29] Ex. 2, R. 1509–1510, 1510–1511, 1521; Ex. 3, R. 1533–1534, 1534–1535, 1537–1538, 1549–1550; Ex. 13, R. 1813, 1819, 1819–1820, 1820–1821; Ex. 4, R. 1561, 1567, 1568–1569; Ex. 5, R. 1583; Ex. 62–B, R. 2538–2539; Ex. 5, R. 1588–1589, 1592; Ex. 28, R. 2184–2189; Ex. 29, R.2216; Ex. 5, R. 1595–1596; Ex. 13, R. 1860; Ex. 5, R. 1599–1600; Ex. 6, R. 1603–1604; Ex. 67, R. 2728; Ex. 68, R. 2728; Ex. 17, R. 2050–2051; Ex. 6, R. 1628; Ex. 7, R. 1641–1642; R. 485; R. 486–487; R. 487–488; R. 488–492; R. 545–546; R. 548.

[30] Ex. 7, R. 1644–1645, 1642, 1642–1643; Ex. 29, R. 2216–2217, 2217–2218; Ex. 62–B, R. 2600–2605; Ex. 7, R. 1660–1661; Ex. 13, R. 1883; R. 496.

[31] Ex. 62–B, R. 2600–2605; Ex. 8, R. 1678–1679; Ex. 9, R. 1688–1689; Ex. 10, R. 1723–1724, 1726, 1727, 1732; Ex. 62–A, R. 2513–2514.

[32] Ex. 17, R. 2040–2041; Ex. 5, R. 1601–1602; Ex. 6, R. 1603–1604; Ex. 17, R. 2041–2043; Ex. 6, R. 1608; Ex. 6, R. 1609; Ex. 17, R. 2044–2048; Ex. 6, R. 1626; Ex. 17, R. 2050–2051; Ex. 6, R. 1627–1628; Ex. 7, R. 1648–1649; Ex. 8, R. 1673; Ex. 17, R. 2052–2055; Ex. 9, R. 1685–1686; Ex. 17, R. 2060–2062, 2064–2066; Ex. 10, R. 1725; Ex. 62–B, R. 2632, 2646; R. 509–510, 538–539.

to leasing agents and made payments to them for services rendered through its subsidiary the Kansas City Industrial Land Company;[33] defendant Union Pacific and said leasing agents carried on the campaign for the securing of tenants for said terminal and inducing produce dealers to transfer their businesses from Kansas City, Missouri, to said food terminal.[34] That defendant Union Pacific caused a large number of its officers, employees, and agents, and the officers, employees, and agents of its subsidiary the Kansas City Industrial Land Company and its corporate affiliate the Pacific Fruit Express Company to render services in connection with said promotional, leasing, and financing activities for considerable periods of time during the years 1937, 1938, and 1939;[35] Advanced large

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[33] Ex. 28, R. 2183–2184; Ex. 4, R. 1568–1573; Ex. 6, R. 1605; Ex. 31, R. 2240–2243; Ex. 13, R. 1856–1857, 1857, 1858, 1861–1862, 1862–1863; R. 582–[illegible]; R. 625; Ex. 9, R. 1704–1705; Ex. 11, R. 1745–1746; Ex. 21, R. 2099; Ex. 22, R. 2115; Ex. 42, R. 2316; Ex. 43, R. 2321; R. 629, 630, 583–585; R. 1247; Ex. 282, R. 3442.

[34] Ex. 4, R. 1560–1561; Ex. 3, R. 1535–1536, 1541–1542; Ex. 91, R. 2762; Ex. 13, R. 1801–1803; Ex. 4, R. 1562–1564; Ex. 4, R. 1569–1570; Ex. 13, R. 1840–1841; Ex. 5, R. 1581–1582; Ex. 5, R. 1585, 1585–1586, 1591–1592, 1595, 1596–1598; Ex. 13, R. 1858–1859; Ex. 9, R. 1690–1691, 1696–1698, 1701–1709; Ex. 10, R. 1725, 1733–1734, 1734, 1740–1742, 1744; Ex. 62–A, R. 2514; Ex. 12, R. 1787; Ex. 62–A, R. 2524–2525; R. 575–576; R. 585–586, 589; Ex. 79, R. 2752; R. 619–623; R. 632; Ex. 105; R. 2851.

[35] Ex. 1, R. 1483–1484; Ex. 2, R. 1484–1485, 1489, 1493–1496, 1503–1506, 1507–1508, 1512–1513; Ex. 3, R. 1535–1536, 1546–1547; Ex. 4, R. 1566–1567; Ex. 5, R. 1577–1578; 1578, 1583, 1584, 1588, 1598–1599, 1602; Ex. 6, R. 1612, 1614, 1620,

sums of money for financing the preliminary expenses of said terminal project, no part of which advances have been repaid."[36]

13

That the defendant Union Pacific in May and June 1937, assisted the City in preparing and presenting an application to the Public Works Administration for a loan and grant of all of the moneys necessary for the construction of a wholesale produce market on the Public Levee of said City."[37] This application was denied."[38] The defendant Union Pacific concluded in February 1938, that the terminal project was feasible without the use of public funds and proceeded with its promotional activities on that basis."[39] The defendant City, with the assistance of the defendant Union Pacific, in June 1938, filed, prosecuted, and supported a new application asking for a grant of $1,710,000 to

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1634–1635, 1635–1637; Ex. 7, R. 1652, 1658, 1659–1660; Ex. 8, R. 1674–1675; Ex. 9, R. 1686–1687, 1696, 1701–1702, 1703–1704, 1704; Ex. 10, R. 1709–1710, 1712, 1726, 1733–1734, 1740–1741; Ex. 11, 1758–1760, 1762; Ex. 12, R. 1765, 1765–1766, 1766, 1770–1771, 1778, 1783; Ex. 14, R. 1965, 1967, 1969–1970, 1972, 1976, 1977, 1978, 1980, 1980–1981, 1981–1986, 1995, 2000, 2001–2002, 2005; Ex. 15, R. 2008, 2009–2010, 2011–2012, 2012–2014, 2015–2016, 2020–2023.

[36] Ex. 31, R. 2233; Ex. 37, R. 2272; R. 908–909.

[37] Ex. 2, R. 1520–1521, 1532–1533; Ex. 62–A, R. 2481–2483; R. 780–781, 837–840.

[38] R. 842.

[39] Ex. 4, R. 1568; Ex. 5, R. 1595–1596.

supply 45% of the cost of the structures to be built by the City as a part of said terminal.[40] The Union Pacific devised a plan for financing the remaining 55% of the cost of the structures through the sale of $3,000,000 of 4% revenue bonds of the defendant City of Kansas City, Kansas, to Stifel, Nicolaus & Company, investment bankers, and to persuade said investment bankers to buy said bonds, offered to execute a limited guaranty in an amount deemed by it sufficient to meet the service charges of the proposed revenue bond issue over and above the rentals then accruing to the City from leases of portions of the Public Levee property; and jointly with defendant City negotiated such an agreement with Stifel, Nicolaus & Company.[41] The Public Works Administration, on October 7, 1938, approved the grant of $1,710,000 to defendant City, but defendant Union Pacific refused to make a guarantee of income sufficient to meet fixed charges on said bond issue, and Stifel, Nicolaus & Company refused to purchase the bonds.[42] Thereupon the

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[40] Ex. 5, R. 1595–1596; Ex. 62–B, R. 2542–2543; Ex. 5, R. 1598–1599; Ex. 6, R. 1607–1608; Ex. 28, R. 2195–2196; Ex. 6, R. 1624; Ex. 28, R. 2197; Ex. 6, R. 1625; Ex. 62–B, R. 2577; Ex. 8, R. 1682–1683; R. 843.

[41] Ex. 13, R. 1813–1814, 1820–1821; Ex. 4, R. 1561; Ex. 5, R. 1583; Ex. 62–B, R. 2538–2539; Ex. 28, R. 2184–2189; Ex. 29, R. 2216; Ex. 13, R. 1860–1861; Ex. 5, R. 1599–1600; Ex. 62–B, R. 2549–2550; Ex. 6, R. 1603; Ex. 17, R. 2050–2051.

[42] Ex. 62–B, R. 2576–2578; Ex. 7, R. 1644–1645, 1642, 1642–1643; R. 496, 545.

defendant Union Pacific purchased said $3,000,000 of Public Levee Revenue Bonds from said City.[43] Said bonds do not constitute a claim against the general revenues of the City of Kansas City, Kansas, and cannot be supported by taxation.[44] The principal and interest of said bonds is secured only by rentals and other revenues received from the leases of portions of the Public Levee,[44] and said bonds were and are speculative and were not then salable in the ordinary course of the commercial investment business.[45]

14

At the suggestion of defendant Union Pacific, defendant Kansas City, Kansas, entered into an agreement, on June 16, 1938, with said defendants DeOreo and Fean designating them as exclusive leasing agents for the markets at the Kansas City Food Terminal for a period of ten years and agreeing to pay them commissions on the rentals received from the occupancy of said market facilities of 5 percent of the rentals for the first year, 4 percent of the rentals during each of the succeeding nine years, and 2½ percent of the rentals during each of the succeeding twenty years.[46]

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[43] Ex. 29, R. 2216–2217, Ex. 62–B, R. 2598–2599, 2600–2605, 2626–2628.

[44] Ex. 62–B, R. 2593–2594.

[45] Ex. 13, R. 1820–1821; R. 488–489, 491–492, 493, 548.

[46] Ex. 2, R. 1484–1501; Ex. 4, R. 1572–1573; Ex. 13, R. 1788–1793; Ex. 28, R. 2183–2184; Ex. 62–A, R. 2488; Ex. 62–B, R. 2543–2549.

That it was estimated by defendants Union Pacific, Kansas City, Kansas, DeOreo and Fean that the commissions to be received by defendants DeOreo and Fean would be between $200,000 and $300,000.[47] That officials of the United States in charge of and investigating the matter of the application of Kansas City, Kansas, for a P. W. A. grant for said food terminal, disapproved of the contracts of defendant Kansas City, Kansas, to pay defendants DeOreo and Fean commissions and made it a condition to the granting of P. W. A. funds that said contracts be cancelled and no other contract for commissions be entered into.[48] That defendants Union Pacific and City of Kansas City, Kansas, negotiated with defendants DeOreo and Fean for the cancellation of their contracts, and said contract between defendants DeOreo and Fean and defendant Kansas City, Kansas, as a result of said negotiations, was cancelled on October 7, 1938.[49] That following the cancellation of said contract with defendant Kansas City, Kansas, defendants DeOreo and Fean threatened to sue defendant Union Pacific for compensation for services rendered as leasing agents in the promotion of said food terminal and threatened to abandon the promotion of said project.[50] That defendants De-

[47] R. 579; Ex. 6, R. 1624; R. 1037–1038.
[48] Ex. 6, R. 1624; Ex. 62–B, R. 2576–2577.
[49] R. 570–581, 624–628, 638–644; Ex. 62–B, R. 2555–2556.
[50] R. 642; Ex. 13, R. 1886–1887.

Oreo and Fean have since said cancellation and until the time this action was instituted continued in the promotion of said food terminal and the securing of tenants for said market from the produce district of Kansas City, Missouri, and have engaged in various related activities in connection with the promotion and operation of said food terminal."[51] That defendant Union Pacific, under an agreement with Fean and DeOreo made in December 1938, has procured the payment by the Kansas City Industrial Land Company, its subsidiary, to defendants DeOreo and Fean, of the sum of $350.00 a month each from November 1, 1938, to and including the present time, with the exception in the case of defendant DeOreo of the months of June, July, and August, 1939."[52]

That thereafter, defendant Union Pacific paid defendant DeOreo the sum of $22,500 for services of said defendant for a period of five months at the Denver terminal of defendant Union Pacific."[53]

15

That defendant Kansas City, Kansas, and defendant officials of said City have at all times acted in cooperation and concert with defendant Union

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[51] Ex. 9, R. 1690–1691, 1701, 1704, 1705, 1708, 1708–1709, Ex. 62–A, R. 2514; R. 585, 632; R. 1260, 1265–1266, 1266–1267.

[52] Ex. 21, R. 2103–2104; Ex. 22, R. 2115; Ex. 42, R. 2316; Ex. 43, R. 2321; R. 584–586, 628–629; Ex. 79, R. 2752; R. 1247; Ex. 282, R. 3442.

[53] Ex. 46, R. 2348; R. 630.

Pacific in the promotion and financing of said food terminal, and have granted and leased to defendant Union Pacific space on its public levee for a team track yard forming an integral part of said terminal for the serving of said terminal by the rails and tracks of the defendant Union Pacific;[54] other railroads do not serve the said terminal except for the joint use by the Missouri Pacific and the Union Pacific of the track leading to the cold storage plant.[55]

16

That the team track yard forming a part of said terminal was constructed by the defendant Union Pacific at a cost of approximately $603,000.[56] That the other parts of said terminal to which legal title is held by the City (namely, the cold storage plant, produce dealers' buildings, farmers' market, and terminal trackage south of Jersey Creek) have been constructed with funds derived as follows: from a grant of $1,710,000 procured from the Public Works Administration of the United States;[57] from revenue bonds of the defendant City in the

[54] Ex. 29, R, 2218; Ex. 62-A, R. 2481-2483; Ex. 62-B, R. 2616-2624; Ex. 94-96, 232, R. 2780-2781, 3055; R. 1146-1147.

[55] Ex. 2, R. 1492, 1497, 1509, 1516, 1528-1529; Ex. 3, R. 1545; Ex. 4, 1565-1566; Ex. 5, R. 1590; Ex. 6, R. 1606, 1629; Ex. 11, R. 1747-1748; Ex. 13, R. 1871-1872; Ex. 204-213, 222-225, R. 3003-3017, 3033-3038; R. 864-868, 924-928, 936-937.

[56] R. 664, 1110; Ex. 5, R. 1594; R. 1233.

[57] Ex. 62-B, R. 2576-2578.

amount of $1,967,000 purchased by the defendant Union Pacific [48] and $149,000 of funds of the City derived from its General Obligation Bonds or from taxation and used for widening Minnesota Avenue and sewer improvements in the terminal area.[49] That the cost of the terminal facilities to which legal title is held by the Union Pacific was $603,000. That the cost of the terminal facilities to which legal title is held by the defendant City is $3,826,000.

17

That said Kansas City Food Terminal, in Kansas City, Kansas, was opened for operation on or about December 4 ,1939.[50] That defendant Union Pacific is now, and since its opening has been, operating the team track yard and other railroad facilities forming part of said terminal.[51] That defendant City of Kansas City, Kansas, is, and since its opening has been, operating and managing the produce market and other facilities forming part of said terminal.[52]

That defendant Fean, with funds provided by defendant Union Pacific and to its interest has heretofore and prior to the opening of said terminal organized and managed the Heart of America

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[48] Ex. 62-B, R. 2600-2605; Ex. 29, R. 2217; Ex. 227, R. 3042; R. 943.

[49] Ex. 141, 227, R. 2907, 3042; R. 943-944, 2907.

[50] Ex. 12, R. 1767-1768, 1771; R. 819-820, 906.

[51] Ex. 12, R. 1767-1768, 1778; Ex. 62-B, R. 2613.

[52] Ex. 9, R. 1690-1691; Ex. 10, R. 1744, Ex. 62-B, R. 2616-2624; Ex. 258, R. 3204; R. 619-621, 821, 1169-1170, 1287.

Growers Association, an organization of the tenants of the farmers' market.[83]

That the defendant Union Pacific and the defendant City of Kansas City, Kansas, have agreed with tenants of the produce market that said market shall be managed by the Kansas City Food Terminal Association; that said association was organized by defendants Joseph DeOreo, William Fean, Ike Sarser, Harry Robinson, and Jack DeFeo, and by one Jasper DeMaria.[84]

18

That at all times during the promotion of said food terminal it has been the purpose of defendant Union Pacific, defendant Kansas City, Kansas, and defendant officials of said City, to induce the produce dealers of greater Kansas City to transfer their entire businesses from Kansas City, Missouri, to said Kansas City Food Terminal in Kansas City, Kansas.[85] That said defendants have at all times since June 1937 been actively engaged in soliciting produce dealers in the produce district of Kansas City, Missouri, to transfer their businesses to and become tenants of the Kansas City Food Terminal in Kansas City, Kansas.[86] That defendants De-

[83] R. 586–587, 588; Ex. 42, R. 2316; R. 1266–1267.

[84] Ex. 4, R. 1562–1564; Ex. 62–B, R. 2020–2021; R. 619–620; Ex. 3, R. 1535–1536, 1541–1542; R. 1169.

[85] Ex. 2, R. 1496–1497, 1504, 1508; Ex. 3, R. 1536–1537; Ex. 4, R. 1560–1561; Ex. 5, R. 1581–1582; Ex. 13, R. 1946–1951.

[86] Ex. 3, R. 1539–1540; Ex. 4, R. 1572–1573; Ex. 5, R. 1581–1582, 1585–1586; Ex. 10, R. 1740–1741; Ex. 62–A, R.

Oreo and Fean have during all of said period assisted defendant Union Pacific and defendant Kansas City, Kansas, in soliciting produce dealer tenants for the Kansas City Food Terminal and transfer of the businesses of such produce dealers from the Kansas City, Missouri, produce district to the Kansas City Food Terminal in Kansas City, Kansas, and from November, 1938, to December 29, 1939, carried on such activities as agents of defendant Union Pacific."

19

That before the opening of said food terminal and during the promotion thereof the defendant Union Pacific conceived and devised a plan of offering and giving special inducements to produce dealers of Kansas City, Missouri, to transfer their businesses to said Kansas City, Food Terminal.[88] That defendant Union Pacific, as early as August 7, 1937, contemplated the necessity of giving inducements to produce dealers to move to said produce terminal, either by making direct payments to them or buying properties from them which it did not want. This appears from a memorandum en-

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2514; Ex. 9, R. 1696–1697; R. 575–576, 576–577, 585–586, 615–622, 632, 636–637.

[87] Ex. 4, R. 1572–1573; Ex. 62–B, R. 2543–2549, 2555–2556; Ex. 9, R. 1699–1701, 1703–1704, 1704–1705, 1708, 1708–1709; Ex. 21, R. 2103–2104; Ex. 22, R. 2115; Ex. 42, R. 2316; Ex. 43, R. 2321; R. 447, 584–585, 628–629.

[88] Ex. 105, R. 2851; Ex. 14, R. 1989–1992; R. 1018, 1177–1180.

titled "Summarizing the Produce Terminal and Market Situation in Greater Kansas City" forming one of the attachments to the letter of that date written by Earle G. Reed, Agricultural Agent of the Union Pacific, to R. R. Mitchell, its freight traffic manager.[69] In the summer and fall of 1937, defendant Joseph DeOreo induced Jasper DeMaria, Ike Sarser, Jack DeFeo, Harry Robinson, and Simon Yukon to serve on a merchants committee for the promotion of said Kansas City Food Terminal, and agreed to pay each of them $5,000 for services on the committee, "and the occupancy * * * of said food terminal" as tenants of the produce buildings.[70] By August 1938, defendant Union Pacific, through its officers, employees, and agents, had negotiated with other defendant produce dealers with respect to cash payments and other inducements to move to the new terminal.[71] The Executive Assistant of defendant Union Pacific, acting on behalf of said defendant and in the scope of his employment, negotiated with defendant produce dealers in respect to cash payments, free rental, reduced rentals, free advertising, free refrigeration, unsecured and inadequately secured loans, and other inducements to persuade said defendant produce dealers to move to the new

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[69] Ex. 14, R. 1989–1992.

[70] R. 595, 619–620; Ex. 86, R. 2757; Ex. 89–90, R. 2759–2760.

[71] R. 1172–1175.

terminal."[72] The Vice-President of defendant Union Pacific, acting on behalf of said defendant and in the scope of his employment and authority from said defendant, presented to the Board of City Commissioners of defendant Kansas City, Kansas, proposals for the payment of concessions to defendant produce dealers and other produce dealers and proposals relative to methods of raising the money to make such payments, and urged and secured their approval."[73] Defendant City and defendant City officials approved said plan for giving special inducements and approved said plan for raising money for the payment of cash concessions, and joined and cooperated with defendant Union Pacific in developing and putting into effect said plan."[74]

20

That in furtherance of said plan and as a part thereof, defendants Union Pacific and Kansas City, Kansas, and defendant City officials, in conjunction with defendants DeOreo and Fean and other persons and corporations, have acted and conspired together to induce defendant produce dealers and other produce dealers to move their businesses

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[72] R. 448–451, 459, 465–469, 647, 714–716; Ex. 105, R. 2851; R. 1069–1077; R. 1256–1257.

[73] Ex. 12, R. 1777, 1780–1781; Ex. 13, R. 1946–1947; R. 857–859, 1118–1121, 1130.

[74] Ex. 12, R. 1783, 1786, 1787, 1788; Ex. 62–B, R. 2653–2656, 2661–2671; R. 662–664, 813–817, 819, 855, 856, 859–861, 874–875, 903–906, 968–969.

from the produce district of Kansas City, Missouri, to the said Kansas City Food Terminal, in Kansas City, Kansas, by means of offers, agreements, payments, and gifts to such defendant produce dealers and other produce dealers of free rents,[75] reduced rents,[76] free refrigeration,[77] cash payments and rental credits purporting to be for the purpose of paying such produce dealers' cost of removal from Kansas City, Missouri, to the Kansas City Food Terminal in Kansas City, Kansas, and the value of furniture and fixtures in their Kansas City, Missouri, places of business and the liability on unexpired leases in Kansas City, Missouri,[78] but in some cases in excess of any such costs, values or liabilities;[79] extensions of credit and unsecured and inadequately secured bank loans at the Riverview State Bank in Kansas City, Kansas (which unsecured or inadequately secured loans, although offered, as aforesaid, were never made by the bank), and free advertising paid for by defendant Union Pacific.[80] That defendant Union Pacific has been active and has taken a part in all the negotiations

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[75] Ex. 62–B, R. 2616–2624; R. 451, 459, 559, 713–714.

[76] Ex. 62–B, R. 2616–2624.

[77] R. 467, 469; Ex. 284, R. 3454–3455; R. 1254–1255.

[78] Ex. 105, R. 2851; R. 684–685, 810–811; Ex. 27, R. 2173; R. 1079–1080, 902, 811–812, 813, 855–856, 857–859, 902–903, Ex. 12, R. 1777, 1780–1781; Ex. 13, R. 1946–1951.

[79] R. 450–451, 455–456, 467–469, 552, 722, 567, 710–711, 610, 611.

[80] Ex. 12, R. 1778, 1783; Ex. 16, R. —; R. 459, 686–687, 687–688, 1087.

with defendant produce dealers whereby said special inducements have been offered, agreed upon or given. That said defendant produce dealers have negotiated for said special inducements and offered to accept the same; have agreed upon leases with the defendant city for space in said terminal at free rent, and at reduced rental;[81] many of said defendant produce dealers have agreed upon cash payments and rental credits;[82] some of said defendant produce dealers have moved to said food terminal and others are still in business in the produce district in Kansas City, Missouri;[83] that in some instances advancements have been made to defendant produce dealers by means of bank loans to be repaid out of cash to be paid as inducements to move to the new terminal;[84] that all of the defendants have participated in and conspired together in the plan in this paragraph mentioned and for the purpose of transferring the business of those defendants and of other produce dealers from the produce district in Kansas City, Missouri, to the Kansas City Food Terminal, and for the purpose of destroying the produce business in the Kansas City, Missouri, produce district.[85]

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[81] Ex. 104, R. 2837; R. 668–669, 669–670.

[82] Ex. 27, R. 2173, Ex. 105, R. 2851; Ex. 62–B, R. 2674–2675, Ex. 62–A, R. 2525.

[83] Ex. 102, R. 2833.

[84] R. 552–553; Ex. 62–B, R. 2674–2675; R. 647, 649, 653–654, 654, 714–715.

[85] Ex. 2, R. 1517–1518; Ex. 3, R. 1536–1537; Ex. 4, R. 1560–1561; Ex. 7, R. 1665; Ex. 9, R. 1685; Ex. 13, R. 1943–1944; Ex. 14, R. 1991–1992.

21

That the major portion of the produce bought and sold by defendant produce dealers and other produce dealers in Greater Kansas City is and has been transported to and from Greater Kansas City by railroad in interstate commerce; and defendant produce dealers and all other produce dealers in Greater Kansas City—whether located in Kansas City, Missouri, or Kansas City, Kansas—have at all times been, and are now, shippers and consignees of shipments of produce or perishable foods by railroads in interstate commerce."

22

That the business of carload wholesale produce dealers at the Food Terminal, of whom the Missouri produce dealers to whom payments have been offered and are about to be given will constitute only a part, is almost exclusively the buying and selling of produce shipped to and from the Food Terminal in interstate commerce upon which produce these dealers pay the freight."

23

Any payment or concession which has been offered or may be hereafter made to the Missouri

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" Ex. 17 (16), R. 2035–2040; R. 464, 549–550, 555–556, 593, 609, 711, 730, 731–732, 734–735, 736–737, 738–739; Ex. 47, R. 2349.

" R. 464, 549–550, 555–556, 593, 609, 711, 730, 731–732, 734–735, 736–737, 738–739, 1093–1095; Separate Answers of defendant produce dealers, R. 97, 100, 103, 105, 169, 177.

dealers to move to the Food Terminal has been offered and will be made for the purpose of inducing them to move to the Food Terminal for the sole and only purpose of engaging in the business of shipping into and out of the Food Terminal products transported in interstate commerce upon which the dealers pay the freight. The premises occupied and to be occupied by the Missouri dealers are designed and leased for, and restricted to, occupancy for that purpose alone."[88]

That by the plan referred to in paragraphs 19 and 20 of these findings cash payments to produce dealers in paragraph 19 mentioned were to be made partly out of the sum of $80,000 in advance rental of cold storage space at said food terminal which the City Ice & Fuel Company had made to defendant City to be used for said purpose, and partly out of the proceeds of City warrants planned to be issued by defendant City of Kansas City, Kansas, against future revenues of the public levee property.[89] That as a part of said plan, in order to procure loans aggregating approximately $95,000, by the Riverview State Bank to defendant produce dealers, said City Ice & Fuel Company deposited the sum of $25,000 with said bank to save it harmless from losses on said loans up to that amount.[90] That defendant Union Pacific proposed and urged said City Ice & Fuel Company to advance said

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[88] Ex. 5, R. 1585–1586; Ex. 62–B, R. 2618.

[89] Ex. 13, R. 1950; Ex. 62–B, R. 2661, 2671; R. 816–817, 819, 904, 906, 968–969.

[90] Ex. 71, R. 2738; R. 520–521, 2738, 653, 656, 658, 816, 855.

$30,000 in rental and to make said $25,000 deposit to guarantee bank loans to produce dealers acting in concert and conspiracy with defendant Kansas City, Kansas, and defendant officials of said City and the said City Ice & Fuel Company and other persons, all as a part of said plan mentioned and stated in paragraph 20 of these findings."[21]

25

That defendant Union Pacific assisted in the preparation of drafts of both petition and answer and otherwise aided defendant Kansas City, Kansas, in securing the institution and conduct of proceedings in the Supreme Court of Kansas whereby said defendant City sought and obtained a decision of said court holding that said City, in so far as the law of Kansas was concerned, acting in a proprietary capacity, had power to make cash payments to produce dealers of Kansas City, Missouri, to induce them to move to said food terminal, out of advance rentals from said City Ice & Fuel Company. That at the hearing of said proceedings in the Supreme Court of Kansas defendant Union Pacific announced, through one of its attorneys, that said defendant, as the holder of the revenue bonds, approved such use of said rental by said City and took the position the court should not interfere with such program."[22]

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[21] Ex. 12, R. 1770–1771, 1788; Ex. 253, R. 3197; R. 816, 855.
[22] Ex. 12, R. 1786–1787; R. 815, 860–861, 875, 662–664.

That defendant Union Pacific Railroad is still the holder of said revenue bonds, and at all times after the issuance of said bonds has been the holder thereof, including all times within which the plan mentioned in paragraphs 19 and 20 and this paragraph, numbered 26, of these findings of fact has been in progress;[**] that defendant Union Pacific, through one or more of its executive officers or agents, initiated and has since participated in all the negotiations with defendant produce dealers and other produce dealers for special inducements, mentioned in paragraph 19 and in this paragraph 26 of these findings, for the most part out of the presence of any officer or agent of defendant Kansas City, Kansas. That in such negotiations the executive officer or agent or executive officers and agents of defendant Union Pacific, initiating and carrying on said negotiations, have dealt in figures, discussed terms and offered and agreed to recommend acceptances of propositions for reduced rentals or cash payments or bank loans, as the case happened to be. That as to each and all of defendant produce dealers, said negotiations were carried on, and special inducements were offered, in part in Kansas City, Missouri, and in part in Kansas City, Kansas, and propositions for such inducements were solicited, accepted, and received by each and all the defendant produce dealers in

[**] R. 499.

part in Kansas City, Missouri, and in part in Kansas City, Kansas."[84]

27

That the negotiations by which defendant Union Pacific assisted in securing the City Ice & Fuel Company, as a tenant for the cold storage facilities at the Kansas City Food Terminal were participated in by defendant Union Pacific, the City Ice & Fuel Company and its officers, and the Pacific Fruit Express Company, a corporate affiliate of the defendant Union Pacific and approximately fifty percent of the stock of which is and at all times in question was owned by defendant Union Pacific."[85] That as an inducement to the City Ice & Fuel Company to become a tenant of said cold storage facilities, defendant Union Pacific and said Fruit Express Company entered into contracts to buy their ice requirements at Kansas City and Omaha from said City Ice & Fuel Company."[86]

28

The principal and compelling motive of the Union Pacific throughout all phases of its activities

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[84] Ex. 105, R. 2851; R. 675–682, 2851–2852, 802–805, 1069–1077, 448–451, 454–456, 458–460, 465–470, 550–551, 561–563, 600–608, 610–612, 646–647, 648–649, 712–713, 714–716, 732–733, 734–736, 737–738, 97–108, 177–184; Ex. 10, R. 1733–1734, 1740–1742; Ex. 13, R. 1925, 1930, 1932; R. 1249–1250.

[85] Ex. 5, R. 1601–1608; Ex. 17, R. 2040–2055, 2063, 2064–2065, Ex. 6, R. 1609, 1626; Ex. 48, R. 2356, 2376.

[86] Ex. 6, R. 1609; Ex. 17, R. 2040–2055; R. 984, 985, 522–526. 509–510, 538–539.

in connection with the origin, promotion, financing, construction, and operation of the Kansas City Food Terminal was to secure additional produce traffic for its line of railroad.[97] Estimates of the amount of increased traffic that the project would bring were made early in 1937 contemporaneously with the decision of the railroad to support the project, and were made from time to time thereafter.[98] Leases of space at the produce market were largely restricted to dealers who are carlot shippers by railroad.[99] When the terminal was finally finished and negotiations for concessions to produce dealers were drawing to a conclusion, the President of the Union Pacific, requested from other officials of said company a definite statement of the amount of the increase in the traffic which would be brought about by the operation and by the removal thereto of the produce dealers to whom concessions were made in the form of money, free rent, unsecured loans and other things of value as inducements to become tenants.[100]

29

The plan of the Union Pacific for building the Kansas City Food Terminal had as its principal

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[97] Ex. 2, R. 1496–1497, 1501–1502, 1515, 1524; Ex. 3, R. 1536–1537; Ex. 4, R. 1570; Ex. 14, R. 1997–1998; Ex. 13, R. 1790–1792.

[98] Ex. 2, R. 1507–1508, 1524; Ex. 3, R. 1553; Ex. 14, R. 1974, 1992–1993.

[99] Ex. 5, R. 1585.

[100] Ex. 16, R. 2039–2040.

purpose and object the increase of its share of produce traffic moving to Kansas City in interstate commerce from California, Washington, Oregon, Idaho, Utah, Wyoming, Colorado, Nebraska, and other states, and to divert such traffic from competing railroads serving Kansas City, including the plaintiff railroads.[101]

30

The plan of the Union Pacific included the transfer of the wholesale fresh fruit and vegetable produce center of the Kansas City Metropolitan area from the north end of Kansas City, Missouri, where it has been located for the past eighty years to the public levee in Kansas City, Kansas.[102]

31

The plan of the Union Pacific in connection with the Kansas City Food Terminal included a plan whereby all railroad service in connection with such terminal, including the operation of the yard tracks, drill tracks, spur track, and side tracks, forming a part of the facilities of said terminal, should be operated exclusively by the Union Pacific.[103]

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[101] Ex. 2, R. 1515, 1524.

[102] Ex. 2, R. 1496–1497, 1508, 1518; Ex. 3, R. 1536–1537; Ex. 4, R. 1560–1561; Ex. 5, R. 1581–1582.

[103] Ex. 2, R. 1491–1492, 1496–1497, 1509, 1516, 1526–1530; Ex. 3, 1545; Ex. 4, R. 1565–1566; Ex. 5, R. 1590; Ex. 6, R. 1606–1607, 1629; Ex. 11, 1747–1748; Ex. 13, R. 1796; Ex. 204–213, 222–225, R. 3003–3018, 3033–3038; R. 864–868, 924–928, 936–937.

32

The purposes and objectives of the Union Pacific in connection with the Kansas City Food Terminal included a plan to avoid in so far as possible the necessity of sharing with competing carriers the traffic moving to and from the Terminal.[104]

33

The acts of the officers of the defendant Union Pacific, in promoting, financing, constructing, and operating the Kansas City Food Terminal, were undertaken and performed for and on behalf of the defendant Union Pacific for the purpose of increasing its freight traffic.[105]

34

In its ordinance authorizing the issue of $3,000,000 of Public Levee Revenue Bonds bought by defendant Union Pacific, the defendant City covenants that so long as any of these bonds remain outstanding all revenues from the operation of the Public levee remaining on hand after the payment of operating expenses and interest and amortization charges on the bonds shall be used to redeem outstanding bonds.[106]

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[104] Ex. 2, R. 1491–1492, 1496–1497, 1509, 1516, 1526–1530; Ex. 3, 1545; Ex. 4, 1565–1566; Ex. 5, R. 1590; Ex. 6, R. 1606–1607, 1629; Ex. 11, R. 1747–1748; Ex. 13, R. 1796; Ex. 204–213, 222–225, R. 3003–3018, 3033–3038; R. 864–868, 924–928, 936–937.

[105] Ex. 2, R. 1515, 1524.

[106] Ex. 62–B, R. 2572.

Under the City's estimates of revenues and expenses of the public levee property during the term of the bonds sufficient revenue will not be received to pay off and cancel the entire bond issue until at the end of twenty-two years.[107]

During the first twenty-two years all of the rentals and other income of the public levee property, including those from the Kansas City Food Terminal, will after the payment of operating expenses, be subject to the lien of the Union Pacific as the bondholder, and the City will get no profit, free surplus or dividends and nothing in the way of a return on the value of the public levee lands or on the outlays made by the City in constructing the Kansas City Food Terminal facilities and other improvements on said lands.[108] The financial benefit said defendant City will receive during this period is limited to an increase in its equity in the public levee property.[109]

The City's forecast of its ability to pay off the bonds in twenty-two years is based upon a ninety percent occupancy of the market facilities as compared with an actual percentage of occupancy of less than thirty-five percent at the present time,[110] and there is assumed an ability to exact the same level of rentals when the market buildings become twenty-five or thirty years old as at the present

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[107] R. 950.
[108] R. 950–951.
[109] R. 956.
[110] Ex. 229, R. 3047; R. 951–952; R. 1388.

time when they are new.[111] The City's estimate of operating expenses is unduly low by reason of the omission of any sums to cover the annual loss due to depreciation and obsolescence not made good by current maintenance.[112]

The defendant City will derive no immediate direct financial benefit from the operation of the Kansas City Food Terminal. The Union Pacific, by reason of the anticipated improvement of the volume of its traffic in perishable produce and consequent increase in its revenues, will receive an immediate and continuing benefit from the project.[113]

35

That at the present produce district of Kansas City, Missouri, certain produce dealers do business in a market building owned by the City of Kansas City, Missouri, and certain other produce dealers do business in privately-owned stores, offices, markets, and warehouses, some of which are owned by the produce dealers themselves and some by other persons.[114] The aggregate value of the buildings, public and private, devoted to buying and selling food in said produce District is substantial. A great part of the value of said property would be destroyed and large losses would be visited upon the produce dealers and other property owners and

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[111] R. 1389–1390.
[112] Ex. 229, R. 3047; R. 955–956.
[113] Ex. 13, R. 820–821.
[114] Ex. 8, R. 1675–1677; R. 1176; R. 1356.

upon the commerce and trade of Kansas City, Missouri, should the defendants proceed in carrying out their agreement by which the defendant produce dealers are to move their places of business to the new Kansas City Food Terminal at Kansas City, Kansas,[115] in return for payments of cash and gifts of free rental and other things of value. Said injury would be irreparable if the concessions heretofore referred to are made because the defendant produce dealers receiving those concessions will move away from the produce district of Kansas City, Missouri, to the new Kansas City Food Terminal at Kansas City, Kansas, and remain there.

36

The major portion of the produce bought and sold in the present produce district of Kansas City, Missouri, is transported to and from said district in interstate and foreign commerce by a number of competing railroads, including defendant Union Pacific Railroad Company, the Atchison, Topeka and Santa Fé Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company and Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, its trustees, and Missouri Pacific Railroad Company and Guy A. Thompson, its trustee.[116] The new Kansas City Food Terminal

[115] Ex. 14, R. 1990; R. 1397–1398.
[116] Ex. 3, R. 1553; Ex. 15, R. 2026.

at Kansas City, Kansas, is located solely on the lines of defendant Union Pacific Railroad Company with the one exception relative to service to the cold-storage plant heretofore noted, and said defendant has an advantage over the above-named competing lines with respect to traffic handled to or from said new terminal,[118] for the reason that a railroad on whose line a shipper is located enjoys a substantial advantage in the solicitation of competitive traffic.[119] If the defendant produce dealers are induced to move their places of business from the Kansas City, Missouri, terminal to the Kansas City, Kansas, terminal the result will be to divert shipments of produce traffic of such defendant produce dealers now being transported in interstate and foreign commerce from the said competing lines to the lines of the defendant Union Pacific Railroad Company, and such diversion would cause a loss of approximately $600,000 a year to the Atchison, Topeka and Santa Fe Railway Company, a loss of approximately $110,000 a year to the Missouri Pacific Railroad Company, a loss of approximately $60,000 a year to the Chicago, Burlington & Quincy Railroad Company, and a substantial loss of revenue annually to the Chicago, Rock Island & Pacific Railway Company,[120] and said loss and diversion will be a con-

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[118] Ex. 2, R. 1515; Ex. 13, R. 1873–1874; Ex. 251, R. 1522–1523.

[119] R. 692–693, 699, 708.

[120] R. 696–697, 701, 703, 705, 708–709.

tinuous one and one for which there is no adequate remedy at law.

37

That at the times of the institution of this action and the granting of the temporary restraining order and the preliminary injunction therein, the defendants were about to and were threatening to continue to carry out the plan set out in paragraphs 19, 20, and 26 of these findings, and are likely to continue to carry out said plan if the preliminary injunction is dissolved and they are not restrained therefrom.

38

The value of the land used in connection with the market facilities on the public levee south of Jersey Creek is 50 cents a square foot.[121] The original cost,[122] cost of reproduction new,[123] and present value of lands [124] of the several market facilities are as follows:

	Produce buildings A–B–C–D	Cold-storage plant	Farmers' market
Original cost (exclusive of land)	$3,039,903	$318,643	$297,313
Cost of reproduction new	1,917,211	313,913	279,313
Value of lands	231,443	48,000	194,643

[121] Ex. 148, R. 2899, 2946; R. 766; R. 1208, 1212, 1224, 1224–1225; Ex. 271, R. 3259, 3317–3318; Ex. 273, R. 3327, 3340, 3353.

[122] Ex. 276, R. 3362.

[123] Ex. 279, R. 3436.

[124] Ex. 271, R. 3259, 3321.

The original-cost and reproduction-cost figures include paving, drainage, water and refrigeration lines, lighting and railroad tracks in the terminal area south of the north boundary line of Jersey Creek,[125] but exclude the cost of certain improvements pertaining to Minnesota Avenue Viaduct and Extension and the public wharf.[126]

Produce Building C was incomplete when the inventory was taken,[127] and an estimated outlay of $100,177 will be required for its completion.[128] Produce Building D consists of two floors; the first floor is used for warehouse purposes and the second floor is utilized for office space. The original cost, cost of reproduction new, and present value of lands of the produce buildings, separated as between warehouse space in Produce Buildings A, B, C, and D, and office space in building D (including $100,177 to complete Building C) are as follows:[129]

	Warehouse space, buildings A–B–C–D	Office space, building D
Original cost (exclusive of land)	$1,985,683	$144,297
Cost of reproduction new	1,883,571	194,817
Value of lands	261,542	

[125] R. 1208, 1233, 1238; Ex. 276, R. 3362, 3362–3366; Ex. 279, R. 3436.

[126] R. 1232, 1233; Ex. 275, R. 3357, 3361–3362; Ex. 277, R. 3367, 3415.

[127] R. 1236.

[128] R. 1268–1269.

[129] Ex. 287, R. 3466; R. 1268–1269, 1270.

The facilities are new, having only recently been completed,[130] and their values with appurtenances are not less than as follows:

Warehouse space in produce buildings A, B, C, and D	$2,144,113
Office space in produce building D	134,817
Cold-storage plant	865,778
Farmers' market	554,380

39

The annual revenues of the several market facilities, as estimated by the City, are as follows:

Warehouse space in produce buildings A, B, C, and D	$126,360
Office space in produce building D	21,000
Cold-storage plant	38,497
Farmers' market	24,664

The annual operating expenses, as estimated by the City, but with the addition of annual depreciation expenses on the straight-line basis, are as follows:

Warehouse space in produce buildings A, B, C, and D	$47,653
Office space in produce building D	17,715
Cold-storage plant	20,944
Farmers' market	21,197

40

The rates of return on the basis of findings as to value and the City's estimates as to operating revenues and expenses, corrected by the addition of annual depreciation expense would be as follows:

Warehouse space in produce buildings A, B, C, and D	3.67 percent.[131]
Office space in produce building D	2.44 percent.[131]
Cold-storage plan	2.03 percent.[131]
Farmers' market	.62 percent.[131]

[130] R. 1235.
[131] Ex. 287, R. 3466.
[132] Ex. 286, R. 3464.

41

The uniform or standard rates of rental adopted and approved by Kansas City, Kansas, for lease of warehouse space and office space at the Kansas City Food Terminal are $150.00 per month per unit[133] and $1.10 per square foot per annum,[134] respectively, and the average rate of rental adopted or approved by Kansas City, Kansas, for lease of the cold storage plant and appurtenant facilities at said Food Terminal is $38,497 per annum.[135] Such rentals are intended to provide sufficient funds to amortize the principal and pay the interest on the Public Levee Revenue Bonds purchased by the defendant Union Pacific Railroad Company, representing 55 percent of the total cost of construction of the said Food Terminal, and to compensate the City of the use of the facilities for the purpose to which they are dedicated.[136]

42

The net return, while low as compared to the fair return of many privately owned utilities devoted to the service of the public, is compensatory and, in view of the purpose of the City to bring

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[133] Ex. 62–B, R. 2616–2624, 2658–2660, 2671–2674; Ex. 228, R. 3044; Ex. 229, R. 3047.

[134] Ex. 13, R. 1855, 1918, 1923; Ex. 189, R. 2906; Ex. 190, R. 2906; Ex. 228, R. 3044; Ex. 229, R. 3047; R. 945.

[135] Ex. 62–B, R. 2647–2648; Ex. 286, R. 3464.

[136] Ex. 4, R. 1563; Ex. 13, R. 1853; Ex. 17, R. 2053; R. 985, 1114; R. 1264.

about industrial improvement and the incidental advantage to the City for that purpose and the return generally obtained from investments in utilities of like or similar nature, the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers.

43

No similar facilities exist in the immediate neighborhood of the Food Terminal, few exist in the United States. One of the principal advantages resulting from such facilities as the Food Terminal is the general benefit to the community and hence the return from such utilities must be considered, at least in part, in the light of their value to the community.

44

There has been no showing of comparability of the perishable produce business and the grain elevator business as they are being conducted at Kansas City at the present time, and no showing of any interrelation or connection of any kind between them.

(S.) J. C. COLLET,
District Judge.

Dated this 8th day of July 1940.

CONCLUSIONS OF LAW

(Filed July 8, 1940)

1

This action is being prosecuted by the United States of America by its attorney for the Western District of Missouri, under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States made by authority of the Act of Congress entitled "An Act to Regulate Commerce," as amended (49 U. S. C. Sec. 12, paragraph 1) and the Act of Congress entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" known as the "Elkins Act," as amended (49 U. S. C. Secs. 41–43). The complaint charges that the defendants have violated and conspired to violate said Acts of Congress by offering, agreeing to give, giving and soliciting rebates, concessions, advantages and discriminations prohibited by said Act, and said complaint prays that said alleged violations of law be temporarily and permanently enjoined. This court has jurisdiction of the subject matter, case, and the parties.

Title 49, U. S. C. Sections 2, 4, 6, 12, and 43;

Title 28, U. S. C. Section 44.

The offering, agreeing upon and giving to defendant produce-dealer shippers and other produce-dealer shippers of cash payments, free rents, rental credits, and reduced rents, for the purpose of inducing said dealer-shippers to remove from the produce district of Kansas City, Missouri, to the Kansas City Food Terminal in Kansas City, Kansas, and each and all of such acts constitute a device for the offer of rebates, concessions, advantages, and discriminations, in violation of the Interstate Commerce Act and the Elkins Act, whereby the produce-dealer-shippers to whom such concessions have been offered and are about to be made, will be enabled to ship and transport freight in interstate commerce at less than the published rates on file with the Interstate Commerce Commission.

Baltimore & O. R. R. Co. v. *United States,* 305 U. S. 507;

United States v. *Union Stock Yards,* 226 U. S. 286;

Vandalia R. R. Co. v. *United States,* 226 Fed. 713 (C. C. A. 7th);

Cleveland C. C. & St. L. Ry. Co. v. *Hirsch,* 204 Fed. 849 (C. C. A. 6th);

Central Georgia Ry. Co. v. *Blount,* 283 Fed. 292 (C. C. A. 5th);

United States v. *Koenig Coal Co.,* 270 U. S. 512;

Armour Packing Co. v. *United States,* 209 U. S. 56;

United States v. *Cleveland, C. C. & St. L. Ry. Co.* (D. C. 1915), 234 Fed. 178.

3

Under the facts found the defendant City of Kansas City, Kansas, defendant officials of said City and the defendants DeOreo and Fean have offered, agreed upon, or given to defendant produce dealers and other produce dealers concessions of the character enumerated in Conclusion 2, and said defendants have thereby offered, agreed upon and given rebates, concessions, advantages, and discriminations in violation of the Interstate Commerce Act and the Elkins Act, whereby the produce dealers to whom such concessions have been offered or given will be enabled to and will transport freight in interstate commerce by a common carrier by railroad at less than the published rates on file with the Interstate Commerce Commission and commit discriminations in violation of the Interstate Commerce Act and the Elkins Act.

United States v. *Koenig Coal Co.*, 270 U. S. 512;

Armour Packing Co. v. *United States*, 209 U. S. 36;

Baltimore & O. R. R. Co. v. *United States*, 305 U. S. 507;

Kansas City Southern Railroad Co. v. *Albers*, 223 U. S. 573.

Under the facts found defendant Union Pacific has cooperated with, joined with, aided and conspired with the defendants named in Conclusion 3 hereof in offering, agreeing upon and giving to defendant produce dealers and other produce dealers, concessions of the character enumerated in Conclusion 2, and the defendant Union Pacific has thereby cooperated with, joined with, aided and conspired with the defendants City of Kansas City, Kansas, its officials and DeOreo and Fean in offering, agreeing upon and giving rebates, concessions, advantages, and discriminations, in violation of the Interstate Commerce Act and the Elkins Act, whereby the produce dealers to whom such concessions have been offered or given will transport freight in interstate commerce by a common carrier or common carriers by railroad at less than the published rate on file with the Interstate Commerce Commission and the Union Pacific will thereby commit discriminations prohibited by the Elkins Act. Each and all of said defendants have so violated the Interstate Commerce Act and the Elkins Act.

United States v. *Koenig Coal Co.*, 270 U. S. 512;

Armour Packing Co. v. *United States*, 209 U. S. 56;

Baltimore & O. R. R. Co. v. *United States*, 305 U. S. 507;

Kansas City Southern Railroad Co. v. *Albers,* 223 U. S. 573;

Thomas v. *United States,* 156 Fed. 897 (C. C. A. 8th);

Interstate Commerce Commission v. *Reichmann,* 145 Fed. 235.

5

In asking for and soliciting cash payments or bonuses, free rentals, and reduced rentals from the Union Pacific and the City of Kansas City, Kansas, the defendant produce dealers solicited rebates, concessions, advantages, and discriminations in violation of the provisions of the Interstate Commerce Act and the Elkins Act, whereby the defendant produce dealers would transport freight in interstate commerce by a common carrier or common carriers engaged in the transportation of freight in interstate commerce at less than the published rates on file.

Baltimore & O. R. R. Co. v. *United States,* 305 U. S. 507;

United States v. *Union Stock Yards,* 226 U. S. 286;

Vandalia R. R. Co. v. *United States,* 226 Fed. 713 (C. C. A. 7th);

Cleveland, C., C. & St. L. Ry. Co. v. *Hirsch,* 204 Fed. 849 (C. C. A. 6th);

Central Georgia Ry. Co., v. *Blount,* 238 Fed. 292 (C. C. A. 5th);

United States v. *Koenig Coal Co.,* 270 U. S. 512;

Armour Packing Co. v. *United States*, 209 U. S. 56.

6

The course of the transactions between defendant Union Pacific Railroad Company, defendants, DeOreo, Fean, City of Kansas City, Kansas, McCombs, Blake, Darby, Skinner, Payne, and Schlup, and the defendant produce dealers, constitutes a subterfuge, scheme, and device for soliciting, offering, giving, granting, accepting, and receiving rebates, concessions, advantages, and discriminations, in violation of the provisions of the Interstate Commerce Act and the Elkins Act, whereby the produce dealers to whom concessions and discriminations have been offered and given and who have solicited concessions and discriminations will transport freight in interstate commerce by a common carrier or common carriers by railroad, at less than the published rates on file.

Baltimore & O. R. R. Co. v. *United States*, 305 U. S. 507;

United States v. *Union Stock Yards*, 226 U. S. 286;

Vandalia R. R. Co. v. *United States*, 226 Fed. 713 (C. C. A. 7th);

Cleveland, C., C. & St. L. Ry. Co. v. *Hirsch*, 204 Fed. 849 (C. C. A. 6th);

Central Georgia Ry. Co. v. *Blount*, 238 Fed. 292 (C. C. A. 5th);

United States v. *Koenig Coal Co.*, 270 U. S. 512;

Armour Packing Co. v. *United States*, 209 U. S. 56.

7

The whole course of the transactions embraced in the findings of fact constitutes a conspiracy on the part of all of the defendants to violate the provisions of the Interstate Commerce Act and the Elkins Act against offering, giving, granting, soliciting, accepting and receiving rebates, concessions, advantages, and discriminations whereby the favored produce dealers will transport freight in interstate commerce by a common carrier or common carriers at less than the published rates on file.

Thomas v. *United States*, 156 Fed. 897 (C. C. A. 8th);

Goode v. *United States*, 58 Fed. (2d) 105 (C. C. A. 8th);

DeVoe v. *United States*, 103 Fed. (2d) 584 (C. C. A. 8th).

8

By reason of the part played by the defendant Union Pacific Railroad Company in the promotion, financing, construction, and operation of the Kansas City Food Terminal, said defendant is a participant with the defendant City of Kansas City, Kansas, in the Kansas City Food Terminal in a joint venture, joint undertaking, joint enterprise,

and joint project and in each of said capacities is jointly and equally responsible with the said City for the offers, gifts, and grants of the said rebates, concessions, advantages, and discriminations.

Bank of America National Trust and Savings Association v. *Fisher*, 61 F. (2d) 53 (C. C. A. 9th);

33 C. J. Joint Adventures, Sections 4 and 5, pp. 842–3.

Hobart-Lee Tie Co. v. *Goodsky*, 329 Mo. 706, 46 S. W. (2d) 859;

Joring v. *Harriss*, 292 F. 974 (C. C. A. 2d);

Denny v. *Guyton*, 327 Mo. 1030, 40 S. W. (2d) 562, 570.

Title 49 U. S. C., section 42;

Title 49 U. S. C., section 10 (1) and (4).

9

The defendants Joseph DeOreo, William Fean, Jasper DeMaria, Harry Robinson, Simon Yukon, Ike Sarser, and Jack DeFeo aided and abetted the defendant Union Pacific and the defendant City and its defendant officials in devising and carrying out the plan, scheme, device, and conspiracy whereby the defendant produce dealers, as shippers in interstate commerce, were to be given rebates, concessions, advantages, and discriminations, in violation of the Interstate Commerce Act and the Elkins Act.

Title 49 U. S. C., section 10 (1) and (4);

Title 49 U. S. C., section 42;

United States v. *Gooding*, 12 Wheat. 460, 476;

Thomas v. *United States*, 156 Fed. 697, (C. C. A. 8th).

10

The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages, and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception, no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil.

Armour Packing Co. v. *United States*, 209 U. S. 56;

United States v. *Koenig Coal Co.*, 270 U. S. 512, 519;

Louisville & Nashville R. R. Co. v. *Mottley*, 219 U. S. 467, 478;

United States v. *Hocking Valley R. R. Co.* 194 Fed. 234.

11

Concessions, rebates, and advantages may be paid in a lump sum before or after the shipment moves, or may consist in periodical or irregular payments,

allowances, or credits. The present proceeding is civil in nature, and the acts complained of—whether done willfully or not—may be restrained and enjoined as to the future.

Vandalia R. R. Co. v. *United States*, 226 Fed. 713 (C. C. A. 7th).

United States v. *Union Stock Yards*, 226 U. S. 286.

12

Defendant Union Pacific by the terms of the revenue bonds in question is given a first lien upon all rentals from said market and said food terminal. Defendant Union Pacific waived its first lien upon the sum of $80,000 in advance rentals paid by the City Ice & Fuel Company, by promoting and negotiating the plan of making cash payments to produce dealers of said $80,000, and by waiver of said lien by said defendant's counsel before the Supreme Court of Kansas at the hearing before that court of the quo warranto proceedings mentioned in evidence.

13

The Supreme Court of Kansas in said quo warranto proceedings had no jurisdiction of the plaintiffs herein or of the subject matter or any part of the subject matter or of any issue now before this court. The Supreme Court of Kansas did not determine, attempt to determine, or purport to determine any issues in this case, but merely held that the City of Kansas City, Kansas, had not and

would not violate any law of the state of Kansas by offering, agreeing upon or giving special inducements to produce dealers to move from Kansas City, Missouri, to the Kansas City Food Terminal. The Supreme Court of Kansas had no jurisdiction to determine or attempt to determine whether the offering, agreeing upon or giving of special inducements to produce dealers violated the terms of the revenue bonds and the lien of defendant Union Pacific upon the rentals of said produce terminal.

State of Kansas, ex rel., J. S. Parker v. *Kansas City, Kansas, et al.*, No. 34,743. 151 Kan. 1.

14

The acts of the officers of the defendant Union Pacific, in promoting, financing, constructing, and operating the Kansas City Food Terminal were undertaken and performed on behalf of said defendant and in the scope of their employment and authority from said defendant for the purpose of increasing its freight traffic and were not undertaken or performed as agents for the City of Kansas City, Kansas.

Title 49, U. S. C., Section 41, Par. 2.
G. R. & I. Ry. Co. v. *United States*, 212 Fed. 577 (C. C. A. 6th).

15

Lease of warehouse and office space, and cold storage plant and appurtenant facilities by a mu-

nicipal corporation, associated with a rail carrier engaged in interstate commerce in a joint project or undertaking to provide and lease such facilities, to shippers and receivers of freight in interstate commerce at rentals which do not provide a proper rate of return upon the value of the facilities leased whereby said shippers are enabled to receive and ship freight in interstate commerce at less than the published rates on file with the Interstate Commerce Commission would constitute the giving and receiving of rebates, concessions, advantages, and discriminations in violation of the Interstate Commerce Act and the Elkins Act.

C. C. C. & St. L. Ry. Co. v. *Hirsch* (1913), 204 Fed. 849. *Central Georgia Ry. Co.* v. *Blount* (1917), 238 Fed. 292. *Nor. Central Ry. Co.* v. *United States*, 241 Fed. 25. *Baltimore & Ohio R. R. Co.* v. *United States* (1939), 305 U. S. 507.

16

A railroad ordinarily may with propriety lease a property which it owns to a shipper so long as it receives in return the fair rental value of the property which is dependent on many factors including general and special economic conditions and which may or may not yield a fair return upon the original cost or cost of reproduction of property previously constructed or acquired. A railroad, however, singly or in conjunction with others, may not properly embark upon a project of construct-

ing new facilities, especially designed for the use of shippers, without exacting rentals which will yield a return upon the cost or value of such facilities. Under the circumstances of this case, the leasing of the facilities of the Kansas City Food Terminal, at present rentals does not result in rebates and concessions in violation of the Interstate Commerce Act and the Elkins Act.

Baltimore & Ohio R. Co. v. *United States* (1939), 305 U. S. 507, 523–5.

17

The rate of return which must be received by a municipal corporation associated with an interstate rail carrier in a joint project or undertaking to construct and lease facilities to shippers and receivers of freight engaged in interstate commerce for the purpose of attracting traffic to the lines of such carrier is the rate of interest which would be sufficient to induce the municipal corporation to invest its funds in the enterprise for the purpose for which the utility is to be used exclusive of any purpose to aid the rail carrier.

18

The rate of interest necessary to secure the funds required to construct and provide the facilities leased to shippers and receivers of freight engaged in interstate commerce is the rate of interest earned on investments in other similar business undertakings constructed and utilized for the same purpose

and which are attended by corresponding risks and uncertainties. Such rate of interest need not under the circumstances of this case exceed the rate of interest earned from an investment in government bonds or other securities.

19

In determining the rate of return which must be received upon the value of facilities specially constructed for and leased to shippers and receivers of freight engaged in interstate commerce, there must first be deducted all expenses of operation, including an annual charge for depreciation resulting from expiration of the useful service life of the facilities leased, due to wear and tear, decay, inadequacy, and obsolescence, which cannot be restored by current repairs and maintenance.

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, 13–14.

Lindheimer v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 167–169 (1934).

Propriety of Operating Practices—New York Warehousing, 216 I. C. C. 291, 336–337, 346 (1936).

Valuation of Texas Midland Railroad, 75 I. C. C. 1, 125–131 and 183–185.

Telephone and Railroad Depreciation Charges, 117 I. C. C. 351, 452 (1931).

20

The full value of public levee land owned by a municipal corporation must be included in the total

value of facilities leased to interstate shippers in determining rentals required to prevent violation of the Interstate Commerce Act and the Elkins Act prohibiting the giving and receiving of rebates, concessions, advantages, and discriminations when such land is leased by the municipal corporation in its proprietary capacity and as a participant with an interstate rail carrier in a joint project or undertaking to provide such facilities, the municipal corporation, under such circumstances, having the same status as the interstate rail carrier with which it has become associated.

C., C., C. & St. L. Ry. Co. v. Hirsch (1913), 204 Fed. 849.

Central Georgia Ry. Co. v. *Blount* (1917), 238 Fed. 292.

Northern Central Ry. Co. v. *United States*, 241 Fed. 25.

Baltimore & Ohio R. R. Co. v. *United States* (1939), 305 U. S. 507.

21

The fair value of the property will be used in determining the rate of return. The source of the invested capital and whether that capital was borrowed or was donated will not affect the fair value.

22

The lessee of a cold storage plant and appurtenant facilities in whose care interstate shipments are consigned by interstate shippers who utilize

storage space therein possesses the status of a shipper engaged in interstate commerce and is subject to the prohibitions contained in the Interstate Commerce Act and the Elkins Act against the solicitation, receipt, and acceptance of rebates, concessions, advantages, and discriminations whereby interstate shipments are transported at less than the published tariff rates on file with the Interstate Commerce Commission.

Merchants Warehouse Co. v. *United States,* 44 Fed. (2d) 379, 385–386; 283 U. S. 501, 505–506.

Terminal Warehouse Co. v. *United States,* 31 F. (2d) 951, 959.

Bailey v. *Penna. R. R. Co.,* 4 Fed. Supp. 786, 788.

St. Louis Terminal Case, 34 I. C. C. 453, 460–461 (1915).

23

It is immaterial, in determining whether rents or rental credits given by the defendant Union Pacific and the defendant City of Kansas, Kansas, to produce-dealer shippers at the Kansas City Food Terminal constitute unlawful rebates or concessions, whether free rents or inadequate rents have been given by the City of Kansas City, Missouri, to tenants of its municipally owned market buildings.

United States v. *Union Stock Yards,* 226 U. S. 286, 302–308–9.

Union Stock Yard & Transit Co. v. *United States* (U. S.) 60 Sup. Ct. 193.

24

The evidence concerning the leases of the grain elevators of plaintiff railroads to shippers and the lease of part of the inbound freight warehouse of the plaintiff Rock Island to a shipper does not show that the plaintiff railroads come into court with unclean hands; and, even if the conclusion in this regard were otherwise, such leases do not have such direct and immediate connection with the matter in litigation as to warrant the application of the doctrine of unclean hands as a ground for denying relief to plaintiff railroads.

Keystone Co. v. *Excavator Co.*, 290 U. S. 240, 245.

Talbot v. *Independent Order of Owls* (C. C. A. 8th, 1915), 220 Fed. 660.

Olsness v. *Home Insurance Co.* (C. C. A. 8th, 1926), 14 Fed. (2d) 907.

Trice v. *Comstock* (C. C. A. 8th, 1903), 121 Fed. 620, 61 L. R. A. 176.

Bentley v. *Tibbals* (C. C. A. 1915), 223 Fed. 247.

Kirby v. *Union Pacific R. Co.* (1911) 51 Colo. 509, 119 Pac. 1042.

Annotation, 4 A. L. R. 44, 65–70, 104–7.

A permanent injunction should issue as prayed for in the complaint.

Upon the foregoing findings of fact and conclusions of law the court directs that a judgment be

entered for a permanent injunction in accordance with the memorandum opinion filed herewith and that a form of entry be prepared by counsel for plaintiffs and submitted to the Court. Counsel for defendant may also submit a paragraph relating to rentals.

(S.) J. C. COLLET,
District Judge.

Dated this 8th day of July 1940.

OPINION ON APPLICATION FOR TEMPORARY INJUNCTION

(Filed March 25, 1940)

Application for temporary injunction in proceeding instituted by the Attorney-General at the request of the Interstate Commerce Commission to restrain alleged violations of the Elkins Act, U. S. C. A. Title 49, Sec. 41, et. seq.[1]

The defendants are the Union Pacific Railroad Company, hereinafter referred to as the Union Pacific, the City of Kansas City, Kansas, and its officials, hereinafter referred to as the "City," a number of wholesale produce dealers who are interstate shippers, two individual defendants characterized as promoters and the latter's attorney.

It is charged that the Union Pacific and the City and the promoters as their agents, have contracted to pay to some, and are offering to pay to other interstate shippers, and the defendant produce dealers as such interstate shippers have accepted or solicited, cash and other valuable

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[1] "* * * it shall be unlawful to offer * * * or give or to solicit, accept, or receive any * * * concession, or discrimination in respect to the transportation of any property in interstate commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination is practiced."

considerations and concessions for locating at a new produce market constructed at Kansas City, Kansas, on the Union Pacific's interstate railroad. The Government contends that since the payments are to produce dealers (who were engaged in that business at Kansas City, Missouri) to induce them to move to the new market at Kansas City, Kansas, and there engage in the interstate transportation of produce over the Union Pacific's lines, the payments are concessions and are "in respect to the transportation of property in interstate commerce" with the result that such property will be transported at a less rate than that named in the tariff (*U. S.* v. *Union Stock Yards and Transit Co.*, 226 U. S. 286). The City is not a common carrier and, acting independently, has the legal right to make the payments unless forbidden by the Elkins Act. *State of Kansas, ex rel. Attorney General* v. *City of Kansas City, Kansas, et al.*, 151 Kansas 1, 98 Pac. (2d) 101. It is charged that the plan for the making of the payments by the City was conceived by it and the Union Pacific acting as joint adventurers and carried out in furtherance of the joint adventure for the benefit of both, and amounts to a device which produces the results prohibited by the Elkins Act. It is plaintiff's contention that one of the objects of the payments to the Missouri dealers is to bring about the discontinuance of a produce market now located in Kansas City, Missouri.

After the institution of this action, upon the application of the Government, the four railroads which serve the Kansas City, Mo., market and the City of Kansas City, Mo., were allowed to join in the proceedings upon the ground that they possessed such an interest as to justify participation as distinguished from their legal right to maintain the action under the Elkins Act. There was evidence tending to show that the annual loss in revenue to these four railroads would total approximately $750,000.00 if the Missouri market was discontinued.

The City concedes that it is about to make payments amounting to approximately $140,000.00[1] to Missouri produce dealers to induce them to move to the new market[2] but asserts that its intention was and is to make the payments independently, on its own account, for the advancement of its own market, without any agreement or understanding with the Union Pacific, and without any intention to influence the movement of interstate traffic.

The Union Pacific denies any participation in the payments.

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[1] Ex. 27, R. 2173–2180.

[2] From City Ordinance 31161, Ex. 62–B, R. 2673:

"In further consideration of the aforesaid, the Lessee hereby covenants and agrees with the City as follows: 1. That he will completely move from his present places of business in Kansas City, Missouri, into the space in the Kansas City Food Terminal (new market) herein leased not later than the 31st day of December 1939."

The separate answers of the many individual defendant produce dealers in some instances admit "conversations," "conferences" and discussions with representatives of the Union Pacific relative to payments to be made, but assert that no payments were promised by the Union Pacific. The answer of the defendant Litman alleges the consummation of an agreement with the City for cash payments to him without knowledge of any conspiracy. He further asserts that any action of this Court which would for any cause prevent him from receiving the agreed payment from the City will deprive him of his property without due process of law. Other issues presented are collateral and incidental. The determination of the cause will depend upon (1) whether the payments are concessions "in respect to" interstate transportation and (2) are devices resulting in concessions or discriminations to interstate shippers. Since the City contends that the market is its individual enterprise and asserts full and sole responsibility for the payments which it concedes it has offered and contracted for, no good purpose would be served in reviewing the evidence bearing upon the City's activities. The facts relative to the interest and participation of the Union Pacific in the project and the joint nature of the enterprise are as follows:

Late in December 1936 defendants Joseph DeOreo and William Fean who had theretofore pro-

moted the construction of wholesale fresh fruit and vegetable markets[4] conferred with a General Agent of the Union Pacific at Cleveland, Ohio, relative to a suitable locality for another such enterprise. They were referred to another agent of the Union Pacific at Kansas City.[5] One of the termini of the Union Pacific was at Kansas City, Kansas, where it owned a tract of land known as the Fairfax District adjoining a tract owned by the City known as the Public Levee.[6] Both of these tracts were or could be served by the Union Pacific.[7] It was the opinion of an executive of the Union Pacific that the Public Levee was the more suitable location.[8] Messrs. DeOreo and Fean were shown both of these tracts as well as others by the Kansas City representatives of the Union Pacific. The Public Levee was selected as the most desirable. The Union Pacific demonstrated much interest in the establishment of the proposed market on its line.[9] Within a short time the officials of the Union Pacific investigated the financial standing and reputation of DeOreo and Fean,[10] formulated a tentative general plan of financing,[11] obtained plans of other markets,[12] considered general plans for this

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[4] Ex. 2, R. 1489.
[5] Ex. 2, R. 1484–1490.
[6] Ex. 2, R. 1486.
[7] Ex. 2, R. 1487.
[8] Ex. 2, R. 1485.
[9] Ex. 2, R. 1485, 1486, 1489, 1493, 1496, 1496–1497.
[10] Ex. 2, R. 1493.
[11] Ex. 2, R. 1491.
[12] Ex. 2, R. 1493.

market,[13] examined the pertinent statutory law of Kansas, assisted in the preparation of amendments thereto necessary to authorize the construction of this market in the manner planned,[14] assisted in securing the introduction of a bill in the Kansas Legislature making those amendments,[15] conferred with a prospective purchaser of bonds to be issued by the City for the construction of the market,[16] interested the City officials in the project,[17] introduced DeOreo and Fean to those officials,[18] obtained estimates of costs,[19] and architects perspective,[20] conferred with Federal Public Works Administration attorneys relative to necessary legislation,[21] and prepared required amendments,[22] developed plans for the construction of yard facilities,[23] costing approximately $300,000.00,[24] analyzed freight handling by all railroads at Kansas City, Missouri, and Kansas City, Kansas, of fruits and vegetables and prepared estimates of additional revenue to be derived by the Union Pacific from the construction

[13] Ex. 2, R. 1497–1501.
[14] Ex. 2, R. 1501.
[15] Ex. 2, R. 1502.
[16] Ex. 2, R. 1510–1511.
[17] Ex. 2, R. 1496–1497.
[18] Ex. 2, R. 1496; R. 572, 615–616.
[19] Ex. 2, R. ——.
[20] Ex. 13, R. 1792–1794.
[21] Ex. 13, R. 1792.
[22] Ex. 2, R. 1504–1506.
[23] Ex. 13, R. 1796.
[24] Ex. 39, R. 2287; Ex. 13, R. 1797–1798.

of the market,[25] assisted in obtaining the passage of the necessary legislation and the signature of the bill by the Governor,[26] and undertook to forestall anticipated opposition from Kansas City, Missouri,[27] all within three or four months from the time the subject was first mentioned. It advanced substantially all of the promotion expenses totaling more than $20,000.00, including advances (or conditional loans) to DeOreo and Fean,[28] the expense of advertising the project,[29] inspection trips to other markets,[30] and of numerous trips to Washington by city officials and others in connection with the City's application for a grant of public funds.[31] It prepared or collaborated in the preparation of the application for the grant,[32] and furnished data supporting the application,[33] furnished much of the engineering advice and direc-

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[25] Ex. 2, R. 1507–1508.

[26] Ex. 13, R. 1797.

[27] Ex. 2, R. 1518, 1519–1520; Ex. 13, R. 1895.

[28] Ex. 6, R. 1609–1610.

[29] Ex. 21, R. 2114.

[30] Ex. 2, R. 1512–1517; Ex. 13, R. 1841.

[31] Ex. 2, R. 1526, 1531–1532; Ex. 13, R. 1840 (The City at no time has recognized any obligation or responsibility for these expenses except for the personal expense of the city employees—See Mr. Skinner's testimony).

[32] Ex. 2, R. 1532–1533—It appears from the minutes of the Board of City Commissioners (Ex. 62–A, R. 2483) that the application was not presented to at least one of the three commissioners until the night of the meeting when the Board was requested to pass the resolution making the application.

[33] Ex. 6, R. 1610–1691.

tion,[34] selected the architects,[35] controlled the cost of the project [36] and type of construction,[37] directed the activities of Mr. Fean [38] and Mr. DeOreo,[39] and planned and supervised the project from beginning to end.[40] It assisted in the preparation of the form of leases,[41] procured the execution of many leases,[42] and dictated the rental charges,[43] took a leading part in the negotiations culminating in the leasing of the cold storage plant, the largest single source of revenue of the produce market,[44] and when the private interests who were expected to purchase the revenue bonds for the principal part of the financing of the project declined to purchase [45] unless the Union Pacific guaranteed the income [46] the Union Pacific rather than make this guaranty

[34] Ex. 13, R. 1895–1899.

[35] Ex. 10, R. 1726; Ex. 62–A, R. 2481.

[36] Ex. 13, R. 1901–1904.

[37] Ex. 13, R. 1916, 1921–1922, 1932–1933, 1934–1935, 1935; Ex. 10, R. 1726, 1727.

[38] Ex. 13, R. 1905–1906.

[39] Ex. 13, R. 1905.

[40] Ex. 14, R. 1986, 1993; Ex. 15, R. 2010–2012, 2015, 2029–2030; Ex. 12, R. 1778, 1783.

[41] Ex. 13, R. 1857.

[42] Ex. 62–A, R. 2514.

[43] Ex. 5, R. 1579, 1583.

[44] Ex. 17, R. 2040–2073; R. 538–539.

[45] Ex. 6, R. 1635, 1638, 1639; Ex. 7, R. 1642. Testimony of Mr. Ketcham, R. 548.

[46] Testimony of Mr. Cravens, R. 485, 486–487, 488, 488.

elected to purchase the bonds [47] in order to insure the success of the project.[48]

The advantages of the public levee site because of freedom from taxation and the benefit of governmental assistance to the City in financing were recognized by the Union Pacific at the inception of the plan.[49] Friendly relations already existed with the City [50] and the latter was readily interested in the project as it had a natural interest in the development of its public levee and the addition of a substantial industry. The new market as planned and later constructed is designed for handling transcontinental carload shipments of fresh fruits and vegetables. Ordinarily, shipments are not consigned to any consignee at the market. Inspection facilities are furnished and upon inspection the produce is either purchased by a wholesale dealer for local distribution or the car diverted to some other distant market. Brokers have facilities at the market and upon purchase divert carloads to designated consignees. Approximately 80% of the traffic arriving at the market is diverted. If shipments come to the market from other rail lines a charge of $6.20 per car is made by the Union Pacific on all cars going in to the market and a like charge for outgoing cars. If the car is unloaded the charge is $13.20. These

[47] Ex. 7, R. 1644–1647.
[48] Ex. 7, R. 1656, 1661.
[49] Ex. 2, R. 1491.
[50] Ex. 2, R. 1487.

charges are absorbed by the line-haul carrier. Facilities are also furnished for sale of small quantities of produce at what is referred to as "farmers stalls."

Across the river in Kansas City, Missouri, a combined wholesale and retail produce market had existed for seventy-five years or more.[51] In many respects it was not well arranged or of modern type.[52] The Union Pacific, DeOreo and Fean, and the City all realized early that a division of the wholesale business between the existing market and the one proposed would be fatal to the success of both.[53] It was therefore planned by the Union Pacific and other interested parties that the produce dealers located at the Missouri Market would be induced to move to the new market.[54] Opposition to this plan was anticipated,[55] hence the early developments of the plan were carefully clothed with the utmost secrecy possible.[56] As the purpose of the proponents of the new market became known the anticipated opposition developed.[57]

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[51] Ex. 2, R. 1488; Ex. 14, R. 1987–1988; Ex. 20, R. 2094.

[52] Ex. 2, R. 1488.

[53] Ex. 14, R. 1985–1986; Ex. 9, R. 1685; Ex. 8, R. 1674; R. 989–990, 991–994.

[54] Ex. 14, R. 1985–1986, 1988, 1989–1990. The unsigned summary appearing in Ex. 14, R. 1986–1992 is identified as Mr. Reed's at page 35 of Ex. 14, R. 1994. Ex. 9, R. 1685; Ex. 8, R. 1674; Ex. 2, R. 1518.

[55] Ex. 14, R. 1990.

[56] Ex. 28, R. 2193–2194; Ex. 2, R. 1518; Ex. 14, R. 1968.

[57] Ex. 2, R. 1532; Ex. 3, R. 1535, 1537–1539.

The campaign for the enlistment of the Missouri dealers to the new enterprise henceforward was open and intense.[58] The efforts of the representatives of the Union Pacific and the City to meet and counteract the opposition to the plan to move the Missouri dealers to the new market were directed by the Union Pacific,[59] were able and ingenious,[60] but were none-the-less honorable and untainted by fraud or chicanery.

As the new market neared completion it was evident that methods more impelling than persuasion or advertisement[61] would be necessary as the desired and necessary number of Missouri dealers had not been definitely committed to the plan to move to the new market. Other methods involving payments or concessions were not unknown to the Union Pacific.[62] The executives of the Union Pa-

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[58] Ex. 3, R. 1541–1544; Ex. 4, R. 1555–1557, 1560–1561, 1568–1573; Ex. 5, R. 1581–1582, 1583–1586, 621–622.

[59] Ex. 4, R. 1564–1565; R. 451; Ex. 14, R. 1985–1986; Ex. 13, R. 1840–1841, 1943–1944.

[60] Ex. 3, R. 1537–1539, 1540–1541; Ex. 14, R. 1976–1992; R. 594–595; R. 619–621; Ex. 9, R. 1690–1691, 1696–1698.

[61] Ex. 12, R. 1778, 1783; Ex. 16, R. 2035; R. 459, 1087.

[62] From Mr. Reed's summary, Ex. 14, R. 1989–1990, 1991–1992: "The apparent danger in the present situation is that of having a 'split market' with a division of retail, wholesale, jobbing, and brokerage business between the two markets. Consequent confusion to the trade, the railroads, and the industry generally, would result. There seems to be a good reason to be apprehensive as to this situation; however, generally speaking, 'the trade' will move, as evidenced by experience at Cleveland, Buffalo, and Albany, N. Y. They will go where the larger volume is handled, the costs are lower, and the facilities are better, or if they are paid for going. Information developed at Buffalo indicates that the

cific were not unmindful, however, of the prohibitions of the Elkins Act.[63] An opinion was given by the legal department of the Union Pacific shortly before the City knew of any necessity to pay dealers to move,[64] to the effect that payments made by the City to shippers would not constitute a violation of that Act.[65] Advice given the City

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railroads involved in the produce terminal actually bought unwanted and unneeded properties of dealers and commission merchants in order to get them to go to the new location.

"If the levee and proposed food terminal is decided upon and the U. P. R. R. enters the arrangement and program it would seem to this writer that the railroad should be prepared for a long, drawn-out political and business fight, with reprisals and retaliation of all kinds being resorted to by the city, the property owners, and politicians. The railroad should be prepared to and might have to buy unwanted properties in order to make certain and secure the investment in the new food terminal tracks and facilities. Our executives should know and recognize all these facts and the possible, even probable, conditions and developments that will take place. In order to insure the success of a food or produce terminal market it is necessary to have at least 55 percent of the trade in numbers locate and 75 percent of volume handled to be at the new location. Experiences of produce terminal markets in Detroit and Buffalo—split markets—are good examples of an undesirable and costly situation."

[63] Ex. 2, R. 1522–1523; Ex. 3, R. 1543–1544; Ex. 10, R. 1742–1743; R. 2100.

[64] R. 449, 1082.

[65] Union Pacific System—Telegram—Ex. 10, R. 1742–1743; R. 1082, 449:

"Denver, *June 28, 1939.*

"Henry N. Ess, *Kansas City, Mo.*,
"T. W. Bockes, *Omaha;* J. L. Haugh, *Denver:*

"TWB is telephoning you regarding problem at KC. If city in Kansas can lawfully commit itself to railroad the

officials by an executive of the Union Pacific that the City could legally pay Missouri dealers to move to the new market may have suggested the method, later adopted, of attempting to circumvent the Elkins Act by the payments being made by the City.

But the public approval and the legality of such payments by the City were doubtful. The first was sought [66] and obtained [67] by the assistance of a committee of prominent citizens selected by the City to consider the matter. The legality of the payments by the City was established by a test suit in the Supreme Court of Kansas expeditiously presented [68] and at least partially directed [69] by the Union Pacific.

After the decision of the Supreme Court of Kansas the City considered itself in a legal position to make the payments to the Missouri dealers but was without proper funds with which to make those

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latter should be safe in advancing funds to city, and city will then have its own relation with its prospective tenants. Some of the leading cases involving the Elkins Act are 241 Fed. 26, wherein court makes pronouncement QT The cases show that it is the law that any pecuniary inducement held out to a shipper to procure his business over a particular railroad is or may be a rebate or concession within the prohibition of the Elkins Act UNQT. See also 226 Fed. 713 and 226 U. S. 286 and 283 U. S. 511 and 1918 A. 798 and 277 Pa. 235. Orig. H. N. Ess Cy. TWB JLH A365.

"A. C. SPENCER,
"*Western General Counsel.*"

[66] Ex. 12, R. 1773, 1777, 1780–1781; Ex. 13, R. 1946, R. 813, 858–859; R. 902–903.

[67] Ex. 13, R. 1951–1956.

[68] Ex. 12, R. 1786–1787; R. 859–860, 874, 903–904.

[69] Ex. 12, R. 1787; R. 860–861, 875.

payments. A tenant had already been secured for the cold storage unit of the market [70] at a contracted annual rental of approximately $37,500.00 per annum to commence upon completion and occupancy of the leased facilities." [71] With the full knowledge, approval and at least some active assistance [72] of the Union Pacific the City negotiated an agreement with that tenant to pay $80,000.00 cash to the City as advance rent [73] for the specific purpose of being used to make the contemplated payments to Missouri dealers." [74]

The negotiations with the Missouri dealers relative to payments were handled in some instances by an executive of the Union Pacific," [75] sometimes by a committee of three of which that executive was one," [76] frequently by DeOreo during periods when he was receiving regular advancements of $300.00 and $350.00 per month," [77] and at a two-day session of an investigating committee composed of City officials." [78]

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[70] Ex. 17, R. 2064–2065, 2067; R. 517–518.

[71] Ex. 62–B, R. 2632–2641, 2646–2649.

[72] Ex. 12, R. 1770–1771, 1775, 1778; Ex. 13, R. 1950; R. 519, 529–531; 816, 854–855, 1122–1123, 1130–1141.

[73] Ex. 62–B, R. 2656–2658, 2661–2664.

[74] Ex. 63, R. 2724A, footnote; R. 819.

[75] Ex. 12, R. 1771–1773; Ex. 16, R. 2033; R. 448–451, 459–460, 465–466, 600–608, 610–611, 714–716, 1069–1075.

[76] R. 454–456, 458–459, 465–470, 550–551, 600–601, 610–611, 732–733, 735–736, 1075–1077.

[77] R. 561–562, 594–597, 610, 619–621, 736–738; Ex. 86, R. 2757; Ex. 89, R. 2759; Ex. 90, R. 2760; Ex. 105, R. 2851.

[78] Ex. 105, R. 2851, R. 675–682, 802–809.

The Union Pacific recognized that the Elkins Act prohibited payments by it to the Missouri dealers.[79] When negotiations by an official of the Union Pacific or the Committee of three with those parties resulted in a tentative understanding or agreement as to amounts which should be paid the dealers to move, the dealers were told that the Union Pacific could not pay them but the matter would be submitted to the City. The City made an estimate of the total amount of concessions necessary. This estimate was based upon a report of the Committee of three which was prepared and submitted by the Union Pacific member. Ordinances were passed authorizing and directing payments based on this estimate[80] upon the execution of a contract by the dealer agreeing to move to the new market[81] and a bond guaranteeing the performance of the contract.[82] The payments which the City proposes to make are not to be made to all dealers at the Missouri Market but only to a sufficient number of the more important or more influential to result in the discontinuance of the Missouri wholesale market.[83] In determining the amount of the proposed payments items such as expense of moving, the settlement of unexpired leases, the value of abandoned fixtures, and in some

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[79] Ex. 12, R. 1771–1772; R. 1047–1048.
[80] Ex. 62–B, R. 2653–2656.
[81] Ex. 62–B, R. 2671–2674; Ex. 13, R. 1950.
[82] R. 682, 818–819.
[83] Ex. 13, R. 1946–1947; R. 663–664.

instances good will at the old location, were considered."[84] The testimony of several dealers with whom negotiations were conducted warrants the conclusion that the primary objective of those who conducted or took part in the negotiations was not the ascertainment of the loss or expense to the dealer of moving, but was the ascertainment of the amount necessary to be paid to bring about the move."[85]

The interest of the Union Pacific in the success of the project is further demonstrated by the financing of the project. As indicated heretofore, the project was financed by a grant of public funds by the Public Works Administration and the issuance of revenue bonds by the City. The grant was for approximately $1,700,000, the bonds totaled $3,000,000. Of this total amount approximately $1,054,000 was for the purpose of retiring a previous issue of revenue bonds secured by all revenues from industries then or thereafter constructed on the public levee. The Federal Authorities conditioned the grant of public funds upon the prior firm commitment by reliable parties to purchase the revenue bonds. A commitment was obtained from an investment banking house which was firm on its face but which contained a time limitation which the proposed purchaser secretly realized could not

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[84] Ex. 62–B, R. 2653–2656; Ex. 106, R. 2854; R. 682, 2854, 803–804.

[85] R. 450–451, 453–456, 467–469, 552, 722–723, 566, 710, 610, 611, 918.

be met. The banking house had insisted that the Union Pacific guarantee the income or that sufficient responsible tenants be committeed to accomplish that purpose. The time limit did expire releasing the bond purchaser from its commitment to buy and the proposed purchaser refused to purchase unless the Union Pacific guaranteed the income. Rather than do this or see the project fail, the Union Pacific purchased the bonds. The sole security for the principal and interest of the bonds is the revenue from the industries located on the public levee of which the market is by far the largest. The lien is junior to necessary operating expenses. When the question arose as to whether the City could legally use the rentals from the market, free of the lien of the bonds, for the purpose of paying the Missouri dealers to move to it, the Union Pacific advised the City such a course was proper and the former's attorney appeared before the Kansas Supreme Court in the Quo Warranto proceeding (151 Kan. 1) urging the right of the City to prefer such payments to the payment of principal and interest on the bonds.

The evidence pointing toward the Union Pacific's connection with the payments by the City to the Missouri dealers, briefly summarized, is as follows: The estimated annual increase in revenues to the Union Pacific if the market is a success is in excess of $200,000.00 annually;** the Union Pacific real-

** Ex. 2, R. 1507, 1524; Ex. 3, R. 1553.

ized the necessity of moving the entire Missouri wholesale market to the new market;[87] it anticipated the probable necessity of paying the Missouri dealers to move;[88] it considered purchasing the property of one Missouri dealer's property, situated near the Missouri market having a value of approximately $75,000, in order to induce that dealer to move to the new market;[89] by moving the Missouri wholesale market to the new market it hoped to make easier the removal of other industries to the adjoining Fairfax district;[90] it realized that it (the Union Pacific) could not pay tenant shippers to move to the new market without violating the Elkins Act;[91] it assumed that tenant shippers could be paid by the City to move without violation of the Elkins Act;[92] its attorneys formulated plans by which funds could be obtained by the City for the making of payments to the Missouri dealers;[93] another of its officials presented and recommended one of those plans to the City officials;[94] that plan was adopted;[95] it assisted in car-

[87] Ex. 2, R. 1518; Ex. 3, R. 1536; Ex. 4, R. 1560–1561; Ex. 9, R. 1685.

[88] Ex. 14, R. 1991–1992.

[89] R. 735–736, 1073–1074.

[90] Ex. 7, R. 1665.

[91] Ex. 10, R. 1742–1743; R. 449, 1047–1048.

[92] Ex. 10, R. 1742–1743; Ex. 12, R. 1770–1771, 1773, 1774, 1775, 1780–1781; R. 856, 1082.

[93] Ex. 12, R. 1770–1771, 1773.

[94] Ex. 12, R. 1777, 1780–1781.

[95] Ex. 62–B, R. 2653–2656.

rying out that plan by assisting in negotiating the necessary contract with the tenant of the Cold Storage Plant;[96] it assisted the City in procuring the necessary legal authority to make the payments;[97] and after the funds were procured and the legal authority obtained by the City, the Union Pacific took a leading part in negotiations for the purpose of determining the amount of the payments to be made to the Missouri dealers. In addition to other financial interests, it was interested in the success of the market to the extent of its $3,000,000 investment in the revenue bonds and approximately $500,000 invested in rail facilities at the market.

From all of the evidence the following ultimate facts or conclusions of fact, as distinguished from conclusions of law, are established:

1. The Union Pacific and the City jointly promoted the market for the financial benefit of both.

2. When it became necessary to pay the Missouri dealers to move to the new market, together the Union Pacific and the City worked out the plan for the City to make those payments and together they set out to and are putting that plan into execution.

3. The Legal Department of the Union Pacific and of the City in good faith believed that the plan

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[96] Ex. 12, R. 1770–1771, 1775, 1788; Ex. 13, R. 1950; R. 519, 529–531, 816, 854–855, 1122–1123, 1130–1141.

[97] Ex. 12, R. 1787; R. 860–861, 875.

adopted would not result in a violation of the Interstate Commerce Commission Act (49 U. S. C. Sec. 12, Paragraph 1) or the Elkins Act (49 U. S. C. Secs. 41–43). The officials of the Union Pacific and the City acted upon that opinion in good faith and with the belief they were not violating the law, adopted the plan and are attempting to execute it.

4. The nature of the business of the Missouri dealers who are to be paid to move to the new market is exclusively the transportation, purchase and sale of products almost all of which are transported in interstate commerce by rail.

5. The primary purpose of the City for making the impending payments to the Missouri dealers is to make the new market a success by the elmination of the Missouri wholesale market.

6. The primary purpose of the Union Pacific in promulgating and carrying out the adopted method of paying the Missouri dealers is likewise the success of the new market. Its interest in the success of the market is twofold. First, the additional revenue to be derived by it, and, Second, the protection of its investment in the revenue bonds.

7. If the payments or concessions are made to the Missouri dealers those dealers will receive an advantage in carrying on their business of shipping products in interstate commerce by rail over other dealers at the same market and elsewhere, equal to the amount of those payments or concessions.

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The proposed payments to Missouri dealers to induce them to move to the new market not being made to all tenants at the new market and being in the nature of bonuses the amount of which was not based on actual loss or expense, fall within the classification of discriminations prohibited by the Elkins Act. As stated in the syllabus of *United States* v. *Union Stock Yards Co.*, 226 U. S. 286:

> A shipper receiving a bonus from the carrier for erecting a plant on the line of the carrier has an undue advantage over a shipper not receiving any bonus or a smaller bonus.

The prohibition of the law applies to any person or corporation whether carrier or not and prohibits the act which produces the forbidden result. Hence, it is not necessary that the carrier make the concessions. The City may not make concessions to shippers if the result is discrimination among shippers relative to interstate transportation.

In construing the Elkins Act in *Spencer Kellog & Sons* v. *United States*, 20 F. (2d) 459, l. c. 461, the scope of the Act was thus defined:

> Its broad and sweeping language is a clear expression of the intendment of Congress to make the purposes of the Act applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than

> those named in the tariffs published by the carriers. * * * The purpose of the act was not to regulate carriers or shippers. Congress intended to prohibit all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers. * * * It was not intended and does not permit any one else, other than shippers and carriers, to grant rebates or concessions. * * *

The City stoutly maintains that so long as its primary motive is to secure tenants and not to divert traffic to the Union Pacific, the violation of the purpose of the law may not be restrained. It bases that argument upon the premise that the statutory law as construed by the highest court of the State authorizes it to obtain tenants in the manner stated. Such assertion takes no cognizance of the fact that the Constitution of the United States is controlling and by it Congress is given exclusive power to regulate interstate commerce. Under that Constitutional authority Congress may and has by the Elkins Act provided that neither the City of Kansas City, Kansas, nor any other corporation or person may for any purpose make concessions which result in discrimination between interstate shippers. The language of the Act is explicit—"* * * it shall be unlawful for any person, persons, or corporation to offer, grant or give * * * any * * * concession, or

discrimination in respect to the transportation of any property in interstate * * * commerce * * * whereby * * * any advantage is given or discrimination is practiced." Because in many of the reported cases the Elkins Act has been invoked to prevent carriers from giving concessions to shippers in order to secure their business to the disadvantage of other carriers, the City seems to assume as a fact the fallacy that the only purpose of the Act is for the carriers' protection. When that purpose of the Act, applicable here—i. e., the prevention of discrimination among shippers is considered—it is readily apparent that the Act may be violated by one not a shipper or carrier when discrimination is produced between shippers, regardless of whether the intention is to prefer one carrier to another.

But the discrimination must be "in respect to the transportation of (any) property in interstate commerce." Ordinarily, a landlord may with impunity and without hindrance by the Elkins Act, offer or grant any concessions it wills to persons engaged in the business of transporting property in interstate commerce to induce such person to become its tenant. It could not be suggested with reason that the City owning an office building might not (statutory authority existing) make a cash payment to one engaged in a business similar to that of the produce dealers to become its tenant. In such a case the City as the landlord makes no requirement that the tenants' business be such that

the payment must necessarily and directly reduce shipping charges to be paid a common carrier. It is suggested that in no event can a payment by one not a carrier be in respect to transportation because the tenant is free to use the payment for any purpose he will and not connected in any way with tariff rates. That argument is only partially correct. In any case where the person making the payment does so under circumstances and conditions which do not require as a result that the payment directly affect the amount of tariff charges to be paid, the payment cannot be said to be in respect to transportation with resulting tariff discrimination. But where the terms of the grant or the circumstances under which it is made are such that the necessary and required result of the grant is to reduce the amount to be paid for transportation charges, the payment is in respect to transportation. In *United States* v. *Union Stock Yards*, 226 U. S. 286, the argument was advanced that the payment of $50,000.00 to a packing company to induce it to erect a packing plant adjacent to the carrier's rail facilities was not based upon the transportation of property and had nothing to do with rates charged or paid, l. c. 293. After determining that the grantor was a carrier and coming to the question of whether the payment was an unlawful discrimination and a fortiori in respect to transportation, attention was directed to the fact that the contract under which the pay-

ment was made required that the packing company ship over the carrier's lines and pay the regular tariff rate. Nothing appears in the opinion as to whether the money paid was to be used for any specific purpose. It is to be assumed that there as here there was no requirement that the payment was required by contract to be used for the payment of freight rates. It was assumed there as it must be in this case that the furnishing of funds with which the shipper could pay freight charges was sufficient to bring about discrimination in favor of that shipper with respect to transportation if the shipper was required as a necessary result of accepting the payment to engage in transportation. In the *Stock Yards case* the contract furnished the necessary connection between the payment and transportation by requiring that the donee ship over the donor's lines. The interest of the donor in making the payment in that case may be disregarded for the purpose of determining whether sufficient connection is produced by the result to make the payment one in respect to transportation since it is the result and not the motive which determines the lawfulness of the act,[88] and fraud or bad faith need not be present.[89] It seems reasonably obvious that the underlying and real ground for holding the payment in the *Stock Yards case*

[88] *United States* v. *Hocking Valley Ry. Co.*, 194 Fed. 234.

[89] *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72–73.

one in respect to transportation was the requirement of the contract, since the statement following relative to the interest of the carrier was merely the statement of additional facts indicative of the direct connection between the payment and transportation which the contract requirement had already established. The *Stock Yards case,* not involving the identical question presented here, possibly should not be controlling authority in this case. The somewhat searching examination of that opinion has been resorted to in order to emphasize and illustrate the principle now to be applied here.

By the very nature, design, and location of that part of the market and connecting facilities which the City proposes to lease to the Missouri dealers to whom payments are to be made and to other produce dealers to whom like facilities are leased but to whom payments are not made, the performance of the payment contracts by the Missouri dealers requires them to move to the new market, and, by the occupancy of the leased premises, requires the result that they engage in interstate transportation. That part of the market to be leased to the Missouri dealers was designed for no other purpose, it can be used for no other purpose, and—referring to intent for the same purpose the Court had in doing so in the Stock Yards case—the City officials had or have no other intention in mind as to the purpose of occupancy than that the premises should be used for the sole and exclusive purpose of trans-

porting products in interstate commerce over the lines of the Union Pacific. The applicability of the Stock Yards case should become apparent. If, in that case, the contractual requirement that acceptance of the payment necessitated transportation was sufficient, coupled with interest indicative of intent, to so connect that payment with transportation that the concession was with respect to transportation, so must the requirement resulting from the type of the facilities, that the tenants of the facilities of the market here involved engage exclusively in interstate transportation over the lines of the Union Pacific, coupled with the intention of the City that they should do so, produce the result that the payments about to be made to those tenants are in respect to transportation. There can be no difference in principle between a contractual requirement and a requirement growing out of absolute necessity. The proposed payments are so definitely intended to be in connection with interstate transportation and are by all the physical facts so necessarily connected with interstate transportation that they are in "respect to transportation." That they constitute concessions resulting in advantages to those who receive them which others will not receive is obvious. That they are prohibited by the Elkins Act is clear from the following language of the Stock Yards case, l. c. 308:

> The Elkins Act makes it an offense for any person or corporation to give or receive any

> rebate, concession, or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced.

But more impelling reasons exist for granting injunctive relief than those heretofore given. The evidence discloses that the new market, or Food Terminal as it has elsewhere been referred to, was conceived by the Union Pacific and DeOreo and Fean. It was promoted by them. The City joined in the enterprise for many good reasons heretofore noted. Messrs. DeOreo and Fean dropped out as proprietors of the enterprise and the project continued as the joint venture of the Union Pacific and the City. Until the time came when the necessity for the proposed payments became obvious, the Union Pacific had advanced practically all of the necessary funds [100] other than the grant of public funds and funds furnished by the City for general improvement of the Levee. Then the time came for the making of the payments to the Missouri dealers, the Union Pacific knowing it could not legally make them said in effect to the City, its joint adventurer—"It is absolutely necessary that the Missouri dealers be moved to the Food Terminal. Here is a method by which we can pay them to move and avoid the letter of the Elkins Act.

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[100] In excess of $3,500,000.00.

You pay them, I cannot. I will help you carry out all of the necessary details. Here is another plan by which you can get the necessary funds without cost to you. If it costs anyone anything it will be my loss and I will assist you in carrying out that plan also. Then when we get the necessary funds I will, with the assistance of two friendly prospective tenants, carry on the necessary negotiations with the Missouri dealers and you need do nothing other than formally make the payments."

The evidence clearly demonstrates that this arrangement was adopted and carried out with the exception that the City officials took a more active part and performed more of the actual labor than was necessary. Whether it be characterized as a joint adventure or a conspiracy is of little moment. Certainly, it was a device within the meaning of the Elkins Act which prohibits concessions—"by any device whatever."

> A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc. *Armour Packing Company* v. *United States*, 209 U. S. l.c. 71.

One additional question requires attention. It is alleged that concessions have been made by the device of having loans made by a friendly bank without adequate security. Although the testi-

mony discloses that many loans have been made by that bank to prospective tenants, it does not show that those loans were made at lower rates of interest than customary or that it was not the intention of the borrowers to repay the loans. Other elements of favoritism are not shown. There was evidence tending to show that one of the loans may have been somewhat inadequately secured but the testimony does not warrant the conclusion that the loan constituted a concession. It is not a violation of the Elkins Act for a bank to make ordinary loans. Neither is it a violation of that Act for the City or the Union Pacific to make such loans or to guarantee their payment so long as unlawful discrimination or actual concessions are not given.[101] Obviously, the City has the statutory authority to guarantee the repayment of loans which it has the legal authority to make. *State ex rel.* v. *Kansas City,* 151 Kan. 2. If these loans are not concessions and the City officials have some understanding relative to their repayment in the event the borrowers fail to do so, that the City may and should do. But those obligations, if any exist, are not proper matters for determination here. If loans constituting concessions should be made, contempt proceedings will furnish adequate recourse.

A formal judgment conforming to the conclusions expressed herein will be entered. All re-

[101] *S. W. Lbr. Co.* v. *Kerr,* 11 F. Supp. 253, 78 F. (2d) 348.

quests for findings and declarations not incorporated in substance in the formal findings and conclusions of the Court will be considered refused. Exceptions allowed to all adverse rulings.

(S.) J. C. COLLET,
District Judge.

Dated at Kansas City, Mo., this 25th day of March 1940.

MEMORANDUM OPINION ON FINAL HEARING

(Filed July 8, 1940)

The parties have stipulated that the record made on the hearing of the application for the preliminary injunction is to be considered by the Court as a part of the record on final hearing. Although the issue on application for preliminary injunction is frequently stated to involve only the existence of probable cause for the issuance of the restraining order yet the facts then presented were developed with such completeness by all parties that practically no additional testimony was offered on those questions at the hearing on the merits. Since the evidence was weighed and the factual conclusions arrived at on the hearing on the application for the preliminary injunction reflected the greater weight of the evidence, the findings of fact and conclusions of law filed herewith are to a large extent repetitions. On the final hearing a substantial amount of additional evidence was offered relating to the rate of return earned from existing rental rates. The question as to whether those rental rates are so low that unlawful concessions result, has been seriously urged for the first time on the final hearing. For that reason findings and conclusions bearing on that question now appear for the first time.

Since the opinion filed at the time the preliminary injunction was under consideration dealt fully with the legal questions there determined, only those questions arising upon the final hearing will be considered at this time. Those questions may be briefly stated as follows:

(1) Does the Court have power to fix a minimum rental rate "until further order of the Court" in order to prevent future rental concessions, and

(2) Are the present rental rates so low that interstate shippers paying those rentals thereby receive concessions? Those questions may be briefly answered.

The Court has no power to fix permanent minimum rental rates even until further order of the Court. It may only enjoin rebates or concessions conferred by inadequate rates. While it may forbid the offering of such rental advantages as will constitute rebates or concessions, rate making is not a proper prerogative of the Court. *Tank Car Co.* v. *Termina Co.*, 308 U. S. 422. The present inquiry will be directed to the determination of whether existing conditions disclose a present violation of law. The legality of future conditions will be determined in the light of facts and circumstances then existing. It will not be presumed that future violations will occur.

In determining whether present rental rates constitute concessions and rebates the fair value of the property will be considered without regard to the source of the capital with which it was acquired.

An over-all net return of from 2% to 3% will result from 90% occupancy at present rentals after providing for operating expenses and a proper depreciation allowance on all depreciable property.

In determining what rate of return will constitute an intentional and unlawful rebate or concession with respect to interstate transportation, economic conditions generally in the community will be considered. The return realized on a particular enterprise will be considered only to the extent of its comparative similarity to the enterprise in question. Fair return, as that term is used in utility regulation, does not measure lawfulness. Nor is confiscation in its strict legal sense determinative of illegality. Only such rentals as will result in returns so meager that the owner would be unwilling to operate the property therefor, absent an improper motive, will result in unlawful concessions. And the conclusion of lawfulness or unlawfulness will be be reached only after considering the nature of the enterprise, the profits generally realized from like enterprises, the resuting incidental and collateral benefits, the use to which the improvement is to be devoted, and other related considerations.

While the Food Terminal was conceived and fostered by the Union Pacific and the promoters in conjunction with the City, the general nature of the enterprise is such that it is properly classified as one from which general benefits will inure

to the entire community. Public markets have existed almost from the beginning of mankind. The recorded history of civilization is replete with references to the early custom of the sovereignty furnishing at little or no cost, a place where the articles of common use may be offered for barter or exchange. The Food Terminal is a modern and glorified development of the ancient market places. It is admirably adapted to the handling of foods of general daily need. A city or community possessing a utility such as this Food Terminal may well be considered fortunate. A city government with due regard for the well-being of the community may in good faith conclude that the general good to be derived from such an enterprise justifies the exaction of less than the "full, fair return" in money to which it and public utilities financed by private capital is entitled to demand. Hence, "fair return," as that term is used in utility regulation, is not the criterion for determining the existence or absence of an unlawful intention to make a personal gift to tenants who are necessary to the success of the enterprise. The sum for which the City may lease its property and still avoid the charge of donating the use of that property may and should be governed to some extent, at least, by the resulting general public benefit which the City Government is obligated to advance.

Evidence of the return received from elevator properties located in the same community is of

little if any value in testing the proper return which should be derived from the Food Terminal. The utilities are so radically different in so many respects that the comparison of revenues can serve no helpful purpose.

The current low rates of interest on securities of the class universally accepted as the exemplification of security are to be considered, not as an absolute criterion, again because of dissimilarity in the purpose of the investors, and also because of the difference in the safety of the investment and other factors. Ordinarily, return from investment in Government securities may safely be accepted as the lowest return which an investor would voluntarily accept. For that reason, if the Food Terminal was not endowed with the characteristic of performing a general public good and was not owned by one who was properly chargeable with promoting that public good as well as conserving the investment, plaintiffs' assertion that the rate of return from the Food Terminal should exceed the current return on Government securities would receive application. But since, as noted, other proper considerations may and should actuate the City-owner in determining a proper return in this case, the return on Government securities will not control.

It is argued by defendants that the effect of *B. & O. Ry. Co.* v. *United States*, 305 U. S. 507, is an approval of a return that is merely compensa-

tory. While that case may indicate such a conclusion on the part of the Interstate Commerce Commission, the Supreme Court merely approved the action of the Commission in forbidding rates which failed to compensate the carriers for actual cost of providing the facilities and did not pass upon the question of whether an order of the Commission requiring a return in excess of actual cost would have been proper, the latter point not being presented by the record.

What has been said will sufficiently indicate the theory upon which the conclusion is based that the present rental rates are not so low that they may be held to result in unlawful concessions.

A formal decree consistent with the conclusions stated will be filed.

(S.) J. C. COLLET,
District Judge.

Dated this 8th day of July.

SUPPLEMENTAL MEMORANDUM ON FINAL HEARING

(Filed July 13, 1940)

Pursuant to the invitation of the Court the parties have submitted proposed forms of a final decree without, of course, in doing so waiving any rights theretofore preserved. With those suggestions of counsel additional arguments have been made and authorities cited on the question of whether the court may properly fix a minimum *rate of return*. Several authorities are cited by plaintiffs in support of their contention that a proper final decree should include the establishment of a minimum rate of return. Those authorities all deal with conventional utility rate cases in which confiscation was the primary issue. If this case was one of that character, those authorities would be controlling, but such is not the case. In rate cases where confiscation is the issue the regulatory body in the first instance and the Court on review is concerned, in the fixing of the rate, with the question of what will be proper for the future. Existing conditions and past experiences of the utility are considered not for the purpose of determining the propriety of present or past rates but for their value and bearing upon what future rates should be. In such cases the object being the ascertainment of what will be proper in the future, price trends, expert

testimony of economists, as to probable future conditions and other related considerations bearing upon a proper conclusion of what the order for the future shall be, are all considered. The fact that these considerations which deal with the future are of controlling importance in rate cases is illustrative of the declaration heretofore made that rate-making bodies and courts in such type of cases are not concerned with the past or the present but are dealing with the future. Therein lies the distinction between those cases and the case at bar. In this case the court is called upon to determine what present conditions are and whether those conditions constitute a violation of the law. As noted in the memorandum opinion heretofore filed, we are dealing now with the question of whether the facts show at present a violation of the law and not in suppositions as to what future violations may possibly occur. And while the order made in this case will enjoin future acts, such inhibition will be made in the light of the present facts and not be based upon the presumption of facts conceivable but not now existing. It is for rate-making bodies acting as the arm of the legislative branch of the government to fix rates *in futuro*. The court determines the existence or nonexistence of a violation of the law upon existing facts.

For the reasons noted, the rate of return for the future will not be determined in this action.

(S.) J. C. COLLET,
District Judge.

ORDER GRANTING PERMANENT INJUNCTION

(Filed July 13, 1940)

This cause came on to be heard upon application of the United States of America, City of Kansas City, Missouri, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of the Chicago, Rock Island & Pacific Railway Company, and Guy A. Thompson, Trustee of Missouri Pacific Railway Company, plaintiffs in said cause, for a permanent injunction; and upon the verified complaint, as amended, of the United States of America; and on the verified answers, as amended, of defendants; and upon the evidence introduced both by plaintiffs and defendants; and after hearing counsel for the respective parties, and memorandum opinion, findings of fact, and conclusions of law of the Court having been filed herein on July 8, 1940; and it appearing to this Court that the Interstate Commerce Act and the Elkins Act have been, now are being, and will be violated by said defendants as alleged in said complaint, and that issuance of a permanent injunction is necessary to prevent continued violations of said statutes and to prevent irreparable damage to the City of Kansas City, Missouri, and to the plaintiff railroads.

It is Ordered, Adjudged, and Decreed as follows:

First, defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, and Truman Schlup, and each of their respective successors in office, officers, agents, attorneys, servants, and employees and any person, firm, or corporation acting by, for, through, or under them, be and hereby are jointly and severally enjoined and restrained—

(1) From offering, granting, or giving, or assisting, joining, or cooperating in offering, granting, or giving cash payments or rental credits, free rents, and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations to defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to move or for moving to the Kansas City Food Terminal or for leasing space or remaining as tenants in said food terminal.

(2) From permitting defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping or receiving traffic by railroad in interstate commerce to occupy or remain as tenants of the wholesale produce buildings or of other facilities at the Kansas City Food Terminal unless said produce dealers, produce brokers, or other persons, firms,

or corporations—(a) shall pay rental for past occupancy of such facilities under the provisions of the temporary restraining order and the preliminary injunction heretofore entered in this cause, and (b) shall pay rental hereafter for such facilities at the same rate charged all other shippers occupying similar facilities at said Terminal, which does not amount to a rebate or concession to any tenant, and which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation. Provided further that nothing contained in this decree shall be construed to limit the City in the renting of said facilities to a unit basis; but in no event shall the rates of rental and charges prescribed for such facilities aggregate less than is hereinabove provided.

Second, defendants Joseph DeOreo and William Fean, and each of their agents, attorneys, servants, and employees, and any person, firm, or corporation acting by, for, through, or under them, be and hereby are jointly and severally enjoined and restrained—

(1) From assisting, joining, or cooperating with, defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, and Truman Schlup, and each of their successors in office, officers, agents, attorneys, serv-

ants, and employees, and any person, firm, or corporation acting by, for, through or under them, in offering, granting, or giving to defendant produce dealers and other produce dealers or produce brokers, or other persons, firms, or corporations shipping produce by railroad in interstate commerce, cash payments or rental credits, free and reduced rentals, unsecured or inadequately secured loans constituting concessions, or other valuable considerations, to move or for moving to the Kansas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

Third, defendant produce dealers and each of their respective officers, agents, attorneys, servants, and employees and any person, firm or corporation acting by, for, through or under them, be and hereby are jointly and severally enjoined and restrained—

(1) From soliciting, accepting, or receiving cash payments or rental credits, free or reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations from defendants Union Pacific Railroad Company, City of Kansas City, Kansas, Don C. McCombs, Francis Blake, George T. Darby, Alton H. Skinner, Howard Payne, Truman Schlup, Joseph DeOreo, and William Fean, and each of their respective successors in office, officers, agents, attorneys, servants, and employees, and any person, firm or corporation acting by, for, through or under

them, to move or for moving to the Kanas City Food Terminal or for leasing space or for remaining as tenants in said food terminal.

(2) From occupying or remaining as tenants of the wholesale produce buildings or of other facilities at the Kansas City Food Terminal without (a) paying rental for past occupancy of such facilities under the provisions of the temporary restraining order and the preliminary injunction heretofore entered in this cause and (b) without paying rental hereafter at the same rate charged all other shippers occupying similar facilities at said terminal, which does not amount to a rebate or concession to any tenant, and which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation.

Fourth, the defendant City of Kansas City, Kansas, shall file with the Clerk of this Court, on or before the 15th day of each month, for the next succeeding twelve (12) months after the entry of this decree, or until this cause is finally determined on appeal, a written statement showing all rental payments made by tenants occupying facilities at the food terminal.

Fifth, that said plantiffs recover from defendants, Union Pacific Railroad Company and The City of Kansas City, Kansas, their costs of this suit.

It is Further Ordered, Adjudged and Decreed that this permanent injunction shall remain in full force and effect until further order of this court; that future proper requests or petitions for modification of this decree may be made by motion in this cause.

Dated at Kansas City, Missouri, this 13th day of July 1940.

(S.) J. C. COLLET,
District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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SUPREME COURT OF THE UNITED STATES.

No. 594.—October Term, 1940.

Union Pacific Railroad Company, a Corporation; City of Kansas City, Kansas; Don C. McCombs, Francis Blake and George T. Darby, Commissioners, etc., et al., Appellants,

vs.

The United States of America, The Atchison, Topeka & Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, et al.

Appeal from the District Court of the United States for the Western District of Missouri.

[June 2, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal involves the legality, under the Elkins Act, of appellants' activities and course of conduct with respect to the new Food Terminal at Kansas City, Kansas. That city and Kansas City, Missouri, are both part of a district known as Greater Kansas City, which for over three-quarters of a century had been served by a produce market located in Kansas City, Missouri. In 1937 the Union Pacific Railroad, acting upon the suggestion of two promoters, DeOreo and Fean, formulated a plan for the construction of a new market in Kansas City, Kansas. The Union Pacific in turn induced the City of Kansas City, Kansas, to undertake the development of such a market, which the City was to construct, operate and own. Union Pacific became interested in the development in order to increase the volume of its traffic; for unlike the situation in the Missouri market it was, with a minor exception, the only railroad with tracks serving the proposed Kansas site. Because business in the Greater Kansas City area was believed insufficient to support a split market, partly in Kansas and partly in Missouri, the plan included taking steps to persuade dealers on the Missouri side to move to Kansas. These negotiations will appear more fully below, but in general they contemplated certain

concessions and free rents by the City of Kansas City, Kansas, to those dealers who decided to make the transfer. Ostensibly this was to compensate the dealers for their costs of removal, but actually, at least in some instances, it went somewhat beyond. Throughout the promotion, financing and leasing of the new market facilities, Union Pacific took a leading and dominant part. The market opened for operation on December 4, 1939.

On December 29, 1939, at the request of the Interstate Commerce Commission, the Government filed a bill to enjoin the Union Pacific, the City of Kansas City, Kansas, certain of their officers and agents, and thirty-three produce dealers, from violating the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, and the Elkins Act, 49 U. S. C. §§ 41-45, which prohibit rebates, concessions and discriminations in respect to the transportation of property by railroad in interstate commerce.[1] Under the provisions of section 3 of the

[1] Section 1 (1) of the Elkins Act (32 Stat. 847; 34 Stat. 587; 49 U. S. C. § 41 (1)), so far as pertinent here, provides:

"Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. . . ."

Elkins Act,[2] four other railroads and the City of Kansas City, Missouri, were permitted to intervene as parties plaintiff. The district court issued a temporary restraining order, held hearings, and on April 10, 1940, granted a temporary injunction. After further hearings a permanent injunction was entered on July 13. The appeal comes direct to this Court by virtue of the Expediting Act, 49 U. S. C. § 45, under section 238(1) of the Judicial Code.[3]

The facts set forth in the findings and opinion of the district court, 32 F. Supp. 917, together with the supporting record references specified by the district judge, give a clear statement of the origin and development of the Kansas City, Kansas, project:

Appellants DeOreo and Fean, before 1937, had promoted various metropolitan terminals with wholesale produce market and rail facilities. In December, 1936, they suggested to Union Pacific the feasibility of such a terminal to be served by its line at Greater

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[2] 32 Stat. 848; 36 Stat. 1167; 49 U. S. C. § 43:

"Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicabe to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. . . . *Provided*, That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

[3] Cf. United States v. Chicago North Shore R. Co., 288 U. S. 1, an appeal from a one-judge court from decree on a petition under section 12(1) of the Interstate Commerce Act as amended, 49 U. S. C. § 12(1); Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 446.

Kansas City, and a plan was soon formulated for the construction of facilities on the Public Levee, property of Kansas City, Kansas; Union Pacific's aim was to increase its traffic and revenues from perishable food products. The plan contemplated that ownership of the terminal be vested in the City, which would be eligible for a PWA grant from the United States to cover part of the construction costs. A further consideration was that a city-owned market would be tax free, and thus able to offer dealers the inducement of especially low rentals. Union Pacific presented engineering and cost estimates to officials of the City of Kansas City, Kansas, who became interested in the project and determined that plans should go forward. Thereafter, Union Pacific and the City participated jointly in the promotion and financing of the terminal, and the court below found after a careful review of the evidence that Union Pacific took "a leading and dominant part." Union Pacific suggested the plan that financing be accomplished by a PWA grant and by revenue bonds of the City, secured only by revenue from the terminal and other levee property. Union Pacific suggested that the City make DeOreo and Fean exclusive leasing agents of the terminal for a period of ten years; when this contract was disapproved by PWA officials, the two promoters were persuaded to consent to its cancellation, and Union Pacific later caused substantial payments to be made to them by its subsidiary, the Kansas City Industrial Land Company. The City's first application for a PWA grant, which it prepared with Union Pacific's assistance, was denied, but a later application for $1,710,000 won approval in October, 1938. This supplied 45% of the cost of structures the City was to build; the remaining 55% was to be obtained by selling revenue bonds to investment bankers. Union Pacific helped the City secure state legislation authorizing the bonds; the bankers, however, declined to purchase them when Union Pacific refused to guarantee income sufficient to meet fixed charges. Union Pacific then decided to buy the bonds for itself, paying $3,000,000 plus accrued interest; $1,033,000 of this was used to retire outstanding revenue bonds, and the remainder made available for construction of the terminal. The bonds, which were held valid in *State ex rel. Beck* v. *Kansas City*, 149 Kan. 252, are secured solely by the revenues accruing from the terminal and other property on the Public Levee; they constitute no claim against the City's general revenues,

and the district court found that they "were and are speculative and were not then salable in the ordinary course of the commercial investment business."

Union Pacific also caused its officers, employees and agents, and those of its subsidiary, the Kansas City Industrial Land Company, and its affiliate, the Pacific Fruit Express Company, to render various services related to the promotional, leasing and financing activities; it advanced money for financing preliminary expenses; and together with the City it supervised the actual construction. The terminal as completed consists of railroad facilities, owned by Union Pacific, for which it spent $603,000; and the City's wholesale produce market, with a cold storage plant, produce dealers' buildings, a farmers' market, and some terminal trackage, all constructed with funds derived from the PWA grant and the revenue bonds sold to Union Pacific.[4] The Food Terminal is a unitary enterprise, with the market and the railroad facilities integral parts of a unified whole. Union Pacific has the only tracks reaching the terminal, except that the Missouri Pacific jointly serves the cold-storage plant.

Active solicitation of the Missouri dealers to move to Kansas began in June, 1937. As early as August, 1937, Union Pacific contemplated the necessity of giving inducements to dealers, either by making direct payments or by buying from them "unwanted properties." In the summer and fall of that year, DeOreo and Fean induced five of the Missouri dealers to serve on a committee for the promotion of the Kansas terminal, agreeing to pay each of them $5000 "in consideration of the services rendered . . . and the occupancy of the food terminal" as tenant. By August, 1938, Union Pacific's employees and agents had negotiated with other dealers with respect to cash payments and other inducements. As opposition developed on the Missouri side, the district court found that the campaign for enlistment of the Missouri dealers became "open and intense." Union Pacific, however, was anxious to avoid violating the Elkins Act, and sought the advice of its legal department, which rendered an opinion that payments made by the City to dealers would be lawful. With the assistance of a committee of prominent citizens, the City was persuaded to undertake such

[4] The City spent an additional $149,000 from its general revenues for street and sewer improvements in the terminal area.

payments; in December, 1939, it passed Resolution 11275 authoring use of the Public Levee Revenue Fund for settlements either with cash or credits on rental, or both, to cover costs incurred by prospective tenants, "due to rental obligations on present places of business and costs due to abandonment of equipment and facilities now located in, and the good will of said established places of business." The legality under state law of such payments by the City was promptly established in a test suit at least partially directed by Union Pacific. *State ex rel. Parker* v. *Kansas City*, 151 Kan. 1 and 2.

The City, although now willing to make payments to prospective tenants where necessary, was lacking funds. In arranging for refrigerator service at the market, Union Pacific contracted to buy its entire Kansas City and Omaha ice requirements from the City Ice & Fuel Company. This company leased the market's cold-storage unit for fifteen years at $37,500 per year; Union Pacific now urged the company to pay the City $80,000 as advance rent. The City Ice & Fuel Company did this and also, at Union Pacific's and the City's suggestion, deposited $25,000 with a bank as collateral for proposed unsecured and inadequately secured loans to Missouri produce dealers, although such loans, while offered, were never actually made.

In the negotiations with the Missouri dealers, Union Pacific's representatives took an active part. The district court found that it and the City acted together to induce prospective tenants "by means of offers, agreements, payments, and gifts to such defendant produce dealers and other produce dealers of free rents, reduced rents, free refrigeration, cash payments and rental credits purporting to be for the purpose of paying such produce dealers' cost of removal from Kansas City, Missouri . . . and the value of furniture and fixtures in their Kansas City, Missouri, places of business and the liability on unexpired leases in Kansas City, Missouri, but in some cases in excess of any such costs, values or liabilities." The opinion adds that "The testimony of several dealers with whom negotiations were conducted warrants the conclusion that the primary objective of those who conducted or took part in the negotiations was not the ascertainment of the loss or expense to the dealer of moving, but was the ascertainment of the amount necessary to be paid to bring about the move."

The record fully supports the trial court's conclusion that the concessions offered were not confined to fair compensation for the costs of removal, as a brief review of the instances specified by the judge will show. Mallin Produce Company, the largest apple concern in the market, claimed $17,300 as its costs of removal, $7,300 for moving its apples, and $10,000 as the "value of existing lease to be abandoned." However, Mallin made no claim that he had any obligations under his Missouri lease;[5] he merely said that he had been assured by his landlord that he could continue the lease as long as he lived, and that he would continue to lease the property "in order to keep a competitor from securing it." Union Pacific's representative nevertheless offered him $15,000 from the City, and then raised the offer to $20,000 when Mallin agreed to take two units instead of one at the terminal. The O. C. Evans Company, which made no statement of the amount of its Missouri investment, was offered $5,000; when it demanded $10,000, the offer was increased to $7,000. The negotiators increased Cherrito's claim from $900 to $1450 by raising the cost figures for his Missouri fixtures above the amounts he had specified. Garrett-Holmes & Company, which had claimed only about $20,000 in the summer of 1939 without presenting definite figures, in December demanded an adjustment of $35,000, and accepted $30,500 in cash and one year's free refrigeration. Settlement was reached on a claim for unexpired rentals of $15,000 and cost of irremovable business fixtures, $20,000. Litman Produce Company was given $15,000 in cash and advance rent after asserting an obligation to pay six years' rent on an unexpired Missouri lease, when in fact the lease was to expire in a few months and merely contained an option to renew for four years; Litman had not exercised the option, though after the injunction he entered into a new lease with his Missouri lessor. Robinson was allowed to put in a claim for $600 for several unexpired months of an asserted six months' lease, when the tenancy was in fact on a month-to-month basis. Winnick Brothers, a banana firm, was allowed more than $7,000 as the unamortized cost of fixtures and equipment that had apparently cost them less than a thousand dollars.

The proposed cash payments to dealers totalled $111,000, and the proposed credits on rent more than $30,000. When negotia-

[5] Further, Mallin had sublet part of the property, and at the time had a net rental expense of no more than $25 per month.

tions with a dealer resulted in a tentative understanding or agreement, he would be told that Union Pacific could not pay him but that the matter would be submitted to the City. The district court's injunction intervened before more than one of the adjustments had been formally agreed to by the City Board and none of these payments had actually been made.

In addition to these circumstances, the standard form lease contained express provisions for free rents and reduced rents. The standard rental adopted was $150 per month per unit, but for the first three months after the official completion date only $50 was charged. Moreover, the terminal opened for business on December 4, 1939; dealers began moving in then and enjoyed rent-free occupation until February 1, 1940, which was announced as the official completion date.

Union Pacific also made available a certain amount of free advertising by interviewing the terminal's tenants on its radio program and allowing them to describe the kind and quality of their produce.

Throughout all phases of these activities, Union Pacific's principal and compelling motive has been to divert produce traffic from other railroads to its own. By tariffs filed with the Interstate Commerce Commission, charges for handling are collected by the Union Pacific for cars originating on or destined to other lines. If the market shifts from Missouri to Kansas, it is estimated that Union Pacific stands to gain traffic revenues of several hundred thousand dollars annually from the development of the market, due largely to the fact that a railroad on whose line a shipper is located enjoys a substantial advantage in soliciting competitive traffic, and comparable losses may be reasonably expected by the railroads now serving the Missouri market.

The Applicable Statutes. The Elkins Act is a part of the federal statutory system for the regulation of interstate carriers of commerce. As with other portions of that system a chief purpose for its enactment was to eliminate rebates, concessions or discriminations from the handling of commerce, to the end that persons and places might carry on their activities on an equal basis. With the adoption of prohibition against open rate cutting, various devices were resorted to.[6] The railroads sought control over competitors

[6] 1897 Annual Report, I. C. C., 47.

to escape rate wars and, despite abhorrence of monopolies even in the utility field, strong in the early years of this century, such concentrations of carrier control were thought to have one advantage at least, the reduction of discriminatory practices.[7] Concealment of the receipt or payment of rebates was made manifest. Strengthening of the enforcement provisions was sought. This effort finally culminated in the legislative authorization of the injunction as the simplest and most summary legal instrument to destroy discrimination.[8] The courts have found the statutes effective to accomplish the destruction of discriminatory practices, whatever their form. Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention.[9] Any and all means to accomplish the prohibited end are banned.[10] We recently said that under competitive conditions existing in the New York area the action of the Commission in attacking discrimination by an order against furnishing non-transportation services below cost to the carrier was valid, although there was no showing that the charges were below fair value.[11] Contribution to a shipper's construction cost is forbidden.[12] In fact favoritism which destroys equality between shippers, however brought about, is not tolerated. Of course, no party to this appeal disputes this broad principle.

Difficulties in statutory construction arise upon further analysis of the statute. Section 1, quoted in note 1, has a provision making it unlawful for any person to give or receive any concession in respect to transportation. A subsequent clause makes the act of giving or receiving a concession a misdemeanor and punishes its violation by "every person or corporation, whether carrier or shipper." Obviously a bonus paid by a railway to induce a prospective shipper to locate along its line would be as much a concession under the statute as a reduction in tariff applicable only to the favored shipper. We are of the opinion that such a payment by a person who is not a carrier, if it is a payment "in respect to transportation," would be equally violative of the section in question.

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7 1900 Annual Report, I. C. C., 13.

8 1902 Annual Report, I. C. C., 8-10; 32 Stat. 848.

9 New Haven R. R. v. I. C. C., 200 U. S. 361, 398.

10 Armour Packing Co. v. United States, 209 U. S. 56, 72.

11 Baltimore & Ohio R. Co. v. United States, 305 U. S. 507, 524.

12 United States v. Union Stock Yards, 226 U. S. 286.

The first prohibition makes it unlawful "for any person or corporation" to give or receive the concession. The appellants' argument that only carriers or shippers are covered is based on the clause stating the punishment to be applicable whether the alleged violator is "carrier or shipper." Such an argument assumes that the carrier and shipper clause restricts the ordinary meaning of "any person." No reason is advanced for such a restriction. As has been set out, there has been a well defined and continuous purpose to eliminate preferences to shippers from our system of transportation for reasons of fairness and to avoid rate wars, detrimental to the efficiency of the carriers. The words stressed by appellants as restrictive were added by the Hepburn Act as an amendment to Section 1 of the Elkins Act to make clear that the earlier phrase "any person, persons or corporation" included shippers as well as carriers.[13] In our view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. Any other conclusion would do violence to a dominant purpose of carrier legislation.

This conclusion is buttressed by other language in the Elkins Act and by decisions in other courts which have dealt with the question. Section 3 authorizes such suits as this against a carrier and such other persons "as the court may deem necessary" when a carrier is "committing any discriminations" and the court may enforce its orders "as well against the parties interested in the traffic" as against the carrier. For example, in *Spencer Kellogg & Sons* v. *United States*, 20 F. (2d) 459, a grain elevator owner, without carrier affiliation or cooperation, was convicted for sharing its allowance for elevation service with a shipper.[14]

The statute specifically requires that the concession given or received shall be "in respect to the transportation of any property in interstate or foreign commerce by any common carrier." As the language of the section covers indisputably the carrier and

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[13] 34 Stat. 584, 588; 40 Cong. Rec. 7022.

[14] See Interstate Commerce Commission *v.* Reichmann, 145 Fed. 235, 240, rebate by non-carrier private car company to shipper, decided prior to the addition of the clause "whether carrier or shipper" by the act of June 29, 1906; United States *v.* Milwaukee Refrigerator Co., 145 Fed. 1007, 1012, likewise decided before the amendment; Dye *v.* United States, 262 Fed. 6; United States *v.* Koenig Coal Co., 270 U. S. 512, 520.

the freight involved in movement into and out of a metropolitan terminal market,[15] only the phrase "in respect to the transportation" requires analysis. What has been said shows its meaning connotes more than discrimination in payment of tariffs. Offering or soliciting the concessions explicitly violates the section. So does a building bonus granted on condition that the favored industry use the carrier's facilities.[16] The concessions are none the less illegal, if made for non-transportation services,[17] as long as they result in lowering directly or indirectly transportation costs to a shipper. That other inducements may also have influenced the concessions is not important when a materially effective purpose is the securing of traffic for an interstate carrier. Where traffic is an object and discriminatory advantage the means employed in attempting to obtain or actually obtaining it, there is a violation of the section in respect to transportation.

Validity of the Plan. Appellants urge that the City's action in making arrangements for payments to dealers located in the Missouri city was taken solely in furtherance of its municipal interests and without intention to influence traffic and consequently not "in respect to the transportation of property." It is pointed out that it is quite permissible and indeed desirable for a railroad, largely dependent as its prosperity is upon the prosperity of the communities reached by its tracks, to take part in furthering civic development. Certainly there can be no objection on the score of illegality under federal transportation acts for a city, anxious to make its market house profitable, to adopt business practices, normal for real estate operators, if the practices do not involve discriminations "in respect to transportation" by interstate carriers. Thus it is understandable that city and railroad might individually and even cooperatively work hand in hand to promote the city's economic welfare without violating the Elkins Act. But the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers. Consequently in the present case the things done are to be appraised by the standards of the statutes, heretofore examined. For this purpose we

[15] Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498.

[16] United States *v.* Union Stock Yard, 226 U. S. 286, 308.

[17] Baltimore & Ohio R. Co. *v.* United States, 305 U. S. 507.

may lay aside as of small importance the action of the Union Pacific in advancing funds for the expenses of an inspection tour to other cities by the Missouri merchants who were thus made familiar with markets similar to the proposed market on the Kansas side of the Missouri River. The use of the railroad's radio time to advertise shippers' available stock in trade, while unlawful, seems too minor for further comment in a suit to enjoin discriminations through cash bonuses and free rent. Further, while it would be a violation of the Elkins Act for a carrier to offer a shipper a concession to be paid to the shipper by a non-carrier, we do not find it necessary to rest the decision here upon the carrier's alleged action in offering payments to shippers by the City. For in this case invalidity of the carrier's action would follow a fortiori from the invalidity of the City's action. Therefore we examine the City's situation.

Enough has heretofore been stated to support fully the conclusion that some shippers obtained agreements from the City committee on negotiations for concessions in return for moving into the new market. In determining whether the concessions were in respect to transportation, the cooperative functioning of railway and City, transportation and municipal officers become significant. The phrase "in respect to transportation" has not a technical connotation. It differs from intent or purpose to affect transportation. It is broader than "in reduction of tariffs" though, as appears from the act, it is such a discrimination as results in transportation "at a less rate than that named in the tariffs . . . or whereby any other advantage is given . . . ." Our attention is not called to any legislative history as to the purpose of the inclusion of the words in the Elkins Act or as to their meaning. We have found none. We are of the view that the phrase limits the "rebate, concession or discrimination" to advantages or disadvantages in transportation but has no further effect. As the discrimination is limited to transportation matters, normally one would find involved in the discrimination not only a user or prospective user of the facilities of the carrier but also the carrier itself. This is true in this instance. Carrier and City, through a committee of employees of each and through DeOreo and Fean and their aides, worked together to bring into the terminal tenants whose business as found below was "shipping into and out of the Food Terminal products transported in interstate commerce upon which the dealers pay the freight."

Where concessions are offered to such dealers by the City in a plan worked out cooperatively by the City and carrier, as here, these concessions are necessarily in respect to transportation. The Union Pacific is charged with the public duty of and is interested in transportation. The promoters brought the scheme for the market first to the railway company. It was impressed with the possibilities and worked earnestly to convince first a few city officials and then the Board of the desirability of action by the City. Money for the preliminary expenses was advanced by the Union Pacific. No objection was made to the use by the City of prepaid rents from the City Ice & Fuel Company to further the removal of the dealers in the manner "conceived and devised," in the words of a finding, by the Union Pacific. The railroad was the "leading and dominant" influence in the entire transaction. If the City was not completely "subservient to the competitive needs" of the carrier, as we said of the warehousing corporations in *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507, 516-17, at least the encouragement and cooperation given by the railroad was of a kind to make it plain that the City's action looked specifically towards gaining traffic for the road. While, as has been stated, it is the result and not the purpose which determines the illegal character of advantages granted shippers, when there is a purpose or plan for securing traffic, developed cooperatively by a carrier and others, the purpose makes clear that the concessions offered are in respect to transportation.

The power of the City to make the concessions and the question of whether any money to be used by the City was contributed directly or indirectly by the Union Pacific do not affect this conclusion. The judgment of the Supreme Court of Kansas in *State ex rel. Parker* v. *Kansas City*,[18] that the City, in its proprietary capacity, under Kansas law has "authority to pay such sums as are necessary . . . to carry out . . . such policies and transactions as may be to the best interest of said city in securing tenants . . . for said Terminal" is not reviewable here. But the opinions in these Kansas cases do not consider or decide whether the proposed payments are a part of a plan to grant advantages to shippers contrary to the Elkins Act. Even if the City's action had been discussed from that standpoint, the result would not con-

[18] 151 Kan. 1 and 2, 8.

clude this Court. It is our duty to determine finally the effect of acts or plans plainly under that federal statute.[19] It is impossible, and in our view immaterial, to determine from the evidence and findings whether the Union Pacific contributed indirectly to the fund for making payments to shippers. The railroad owned a three million dollar bond issue which carries a covenant to apply all revenues of the properties involved, after operating expenses, to the bond liquidation. By acquiescing in the application of the revenues to secure tenants, the railway did contribute financially, if there was a failure to earn enough to meet expenses. The estimates as to earnings are necessarily uncertain. From its finding that the projected net return was compensatory, the district court was apparently of the view that the Terminal would pay out.[20]

Injunction. One provision of the permanent injunction entered by the district court enjoined the Union Pacific and Kansas City, Kansas, and their officers or agents from giving cash or rental credits to produce dealers to move into or remain in quarters in the Kansas City Food Terminal.[21] The appellants assign as error the

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19 Houston & Texas Ry. *v.* United States, 234 U. S. 342, 351; United States *v.* California, 297 U. S. 175; Palmer *v.* Massachusetts, 308 U. S. 79, 84; New York *v.* United States, 257 U. S. 591, 600-01; United States *v.* Holt Bank, 270 U. S. 49, 55-56; Morgan *v.* Commissioner, 309 U. S. 78, 80-81; Chicago Board of Trade *v.* Johnson, 264 U. S. 1, 10; City of New York *v.* Fairing, No. 863, October Term 1940, decided May 26, 1941.

20 The difficulty is shown by the district court's language in finding 34:

"The City's forecast of its ability to pay off the bonds in twenty-two years is based upon a ninety percent occupancy of the market facilities as compared with an actual percentage of occupancy of less than thirty-five percent at the present time, and there is assumed an ability to exact the same level of rentals when the market buildings become twenty-five or thirty years old as at the present time when they are new. The City's estimate of operating expenses is unduly low by reason of the omission of any sums to cover the annual loss due to depreciation and obsolescence not made good by current maintenance.

"The defendant City will derive no immediate direct financial benefit from the operation of the Kansas City Food Terminal. The Union Pacific, by reason of the anticipated improvement of the volume of its traffic in perishable produce and consequent increase in its revenues, will receive an immediate and continuing benefit from the project."

21 This provision reads: "(1) From offering, granting, or giving, or assisting, joining, or cooperating in offering, granting, or giving cash payments or rental credits, free rents, and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations to defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping produce by railroad in interstate commerce to move or for moving to the Kansas City Food Terminal or for leasing space or remaining as tenants in said food terminal."

action of the district court in entering any prohibition against payments "in such amounts as its [the City's] governing body may determine" and "against use of its Public Levee revenues" for the payment of "damages sustained by produce dealers moving" to the Terminal.

Resolution 11275 was construed by the Supreme Court of Kansas to authorize disbursements of available market funds for such purposes "as in the judgment of said governing body will be to the best interests of the city."[22] By the resolution these expenditures were limited to the dealers' actual costs of removal, including loss of good will.

In prior sections of this opinion, it has been pointed out that any concession by any person or corporation in respect to transportation is forbidden by the federal transportation statutes. The paragraph of the injunction now under examination undertakes to apply this rule so that no cash payments or rental credits may be given. It is clear that in so far as such cash or credit is a "rebate, concession or discrimination" such an injunction is proper, but do all payments to induce dealers to rent space in the Terminal fall in these classifications? The trial court said,

"The proposed payments to Missouri dealers to induce them to move to the new market not being made to all tenants at the new market and being in the nature of bonuses the amount of which was not based on actual loss or expense, fall within the classification of discriminations prohibited by the Elkins Act."

The words of the injunction, however, go farther and forbid payments even though the payments are in all fairness and strictness limited to actual and necessary expenses and losses in moving an establishment. Consequently in deciding the form of the injunction, we need to determine the breadth of language necessary "to suppress the unlawful practices" and preclude their revival.[23] The district court summarized in findings of fact and conclusions of law the constant activity of the Union Pacific in pressing forward the idea of the Terminal. It had before it the testimony that the road sought, meticulously, to avoid conflict with the Elkins Act and yet

[22] State *ex rel.* Parker v. Kansas City, 151 Kan. 2, 8.

[23] Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461. Cf. N. L. R. B. v. Express Publishing Co., No. 442, October Term 1940, p. 7, slip opinion, decided March 3, 1941.

gain the installation of the market; that the railway representatives acted with the City committees and talked with prospective tenants. Railroad influence pervaded each City action and in those circumstances, the decree must be molded to meet the danger of subtle moves against the equality between shippers guaranteed by the Elkins Act.

Where, as here, the action of the City in giving cash and rental credits is, as we have decided, a part of a plan in respect to transportation resulting in an advantage to shippers, we conclude that the giving of any cash, rental credit, free or reduced rents to induce leasing of space in the Terminal is contrary to the Elkins Act. Even if we assume that nothing will be given except the actual costs of removal, the receipt of those costs would put the shipper in a preferred position to all other shippers using the facilities of an interstate carrier who did not receive such concessions. The act condemns any device "whereby any other advantage [than lower tariffs] is given. . . ." The wording of paragraph (1) is approved.

Another prohibition of the injunction determines that the rates for space shall be such "which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation."[24] Identical language in paragraph Third (2) of the injunction forbids produce dealers, of whom many were parties to this proceeding, and their agents from being tenants of

[24] The full paragraph enjoins the Union Pacific and the City of Kansas City, Kansas, and their officers and employees,

"(2) From permitting defendant produce dealers or other produce dealers, or produce brokers or other persons, firms, or corporations shipping or receiving traffic by railroad in interstate commerce to occupy or remain as tenants of the wholesale produce buildings or of other facilities at the Kansas City Food Terminal unless said produce dealers, produce brokers, or other persons, firms, or corporations—(a) shall pay rental for past occupancy of such facilities under the provisions of the temporary restraining order and the preliminary injunction heretofore entered in this cause, and (b) shall pay rental hereafter for such facilities at the same rate charged all other shippers occupying similar facilities at said Terminal, which does not amount to a rebate or concession to any tenant, and which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation. Provided further that nothing contained in this decree shall be construed to limit the City in the renting of said facilities to a unit basis; but in no event shall the rates of rental and charges prescribed for such facilities aggregate less than is hereinabove provided."

the Terminal at rental rates which are not adequate to yield the required amount. The inclusion of this requirement is in our opinion erroneous. The words quoted in the text should be stricken and the injunction amended by inserting in lieu of the stricken words the following: "which is a fair rental value for the facilities occupied." The reasons for the deletion follow.

The preliminary injunction referred to in the excerpt from the final injunction quoted in note 24 set the rentals at not less than certain definite amounts per month and per annum for operating units and office space. There were allowances for uncompleted facilities not now important. No issue is raised here as to whether the sums fixed were or were not a fair rental value. Adequate findings determined the values of the facilities, the estimated gross and net revenues and rates of return. With these findings before it, the district court further found in its final order that the rates fixed in the preliminary injunction were compensatory and did not amount "to a gift of any part of the value of the use of the Food Terminal to the tenant shippers."[25] This result is not questioned. It may therefore be concluded that this scale of charges meets the requirements of the decree for aggregate rates which do not amount to concessions. Since the adequacy of these rates was reached in considering the full value of the properties, including the land furnished by the City and the grant from the

[25] These ultimate findings are as follows:

"41. The uniform or standard rates of rental adopted and approved by Kansas City, Kansas, for lease of warehouse space and office space at the Kansas City Food Terminal are $150.00 per month per unit and $1.10 per square foot per annum, respectively, and the average rate of rental adopted or approved by Kansas City, Kansas, for lease of the cold storage plant and appurtenant facilities at said Food Terminal is $38,497 per annum. Such rentals are intended to provide sufficient funds to amortize the principal and pay the interest on the Public Levee Revenue Bonds purchased by the defendant Union Pacific Railroad Company, representing 55 percent of the total cost of construction of the said Food Terminal, and to compensate the City for the use of the facilities for the purpose to which they are dedicated.

"42. The net return, while low as compared to the fair return of many privately owned utilities devoted to the service of the public, is compensatory and, in view of the purpose of the City to bring about industrial improvement and the incidental advantage to the City for that purpose and the return generally obtained from investments in utilities of like or similar nature, the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers."

Public Works Administration, it may be assumed that they are not less than a fair rental value. The last paragraph of the order provides a method for modification by application to the court should either side be of opinion that this assumption is incorrect. As will immediately appear from this opinion, it is unnecessary to give consideration to the contention that the district court erred in adding the value of the City's land and the amount of the grant to the cost of the facilities. If the correct test is fair rental value, cost of facility is only persuasive, not determinative. Consequently it may be shown as a material factor in determining the fair rental value of the properties but the rates are not required to be upon a level which will give a return upon the value of the investment as a whole.

Fair rental value rather than a compensatory return upon full value of the market facilities is the standard by which the City's schedule of rates is to be judged. To determine fair rental value the going rates of rental for similar facilities in the community are significant, as are the rentals prospective tenants are willing to pay. Likewise evidence of the overall cost and the overall value of the properties would be material. The cost of furnishing the facilities, including the normal return on capital employed in like enterprises would have weight. Other pertinent factors would doubtless emerge in a controversy to have determined judicially, whether certain rentals received are or are not fair. When enough evidence is offered to justify a conclusion based upon judgment and not guesswork, the requirements of the judicial process are met.[26]

This is not the case for a rigid rule that aggregate rentals are to equal costs, such as was applied in *Baltimore & Ohio R. Co.* v. *United States*, 305 U. S. 507, 523-524, where this Court approved an order of the Interstate Commerce Commission designed to root out competitive evils in discriminatory warehousing indulged in by carriers in an effort to acquire traffic. The City is entitled to develop its properties and location in accordance with the laws of Kansas for civic advantage, so long as it does not utilize its facilities in furtherance of a scheme to obtain customers for a carrier by the offering of concessions, contrary to the Elkins Act. It was

[26] Cf. Palmer *v.* Connecticut Ry. & Lighting Co., 311 U. S. 544, 559, and cases cited.

recognized in *Baltimore & Ohio R. Co.* v. *United States* that a charge of fair rental value for services accessorial to transportation would adequately protect even a carrier under proper circumstances. We are of the view that rental charges fixed upon that concept will avoid the discriminatory evils proscribed by the Elkins Act.

With the modifications directed in this opinion, the order of the district court is

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

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Test:

Clerk, Supreme Court, U. S.

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SUPREME COURT OF THE UNITED STATES.

No. 594.—October Term, 1940.

Union Pacific Railroad Company, a corporation; City of Kansas City, Kansas; Don C. McCombs, Francis Blake, and George T. Darby, Commissioners, etc., et al., Appellants,

vs.

The United States of America; The Atchison, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company, et al.

Appeal from the District Court of the United States for the Western District of Missouri.

[June 2, 1941.]

Mr. Justice Roberts.

I cannot agree with the judgment in this case. In last analysis the question presented is whether the Elkins Act proscribes financial transactions by a city with proposed occupants of a city-owned building because those occupants will be shippers in interstate commerce from such building, where the city is to furnish no facilities or services of transportation, where the transactions involve no payments, concessions or discriminations on the part of any interstate carrier, are authorized by State law and are for the city's benefit. A subsidiary question is whether in fact the proposed transactions amount to discriminations in favor of such occupants. A further question is presented with respect to the decree to be entered.

I find it unnecessary to discuss the evidence in detail, or narrowly to examine the findings. I shall endeavor, for the purpose of reaching the legal questions, to consider the case in the light most favorable to the appellees.

The defendants De Oreo and Fean are not philanthropists but promoters who had more or less successfully promoted produce terminals in various cities. They conceived the plan of establishing one in Kansas City, Kansas. They expected a profit out of the venture. Their original idea was that they should become lessees of the termi-

nal and make their profit by subrenting space in it. When this purpose was abandoned they sought to be made exclusive rental agents. Objection by the P. W. A. rendered this proposal impracticable. They have received considerable payments from Union Pacific for their efforts in connection with the establishment of the terminal.

De Oreo and Fean presented their plan to Union Pacific. That company took an interest, not eleemosynary but practical, in the project. Inasmuch as its tracks would serve the proposed terminal the railroad naturally desired that the plan go through so that it might get increased business and obtain a competitive advantage over other railroads serving the area known as Greater Kansas City and particularly the food terminal at Kansas City, Missouri. But the railroad did not desire to erect the terminal. It sought to interest the officials of Kansas City, Kansas, in the scheme, and succeeded in doing so.

Some years ago Kansas City, Kansas, had been given a large tract of water front land which, until recently, had been unused. Through a P. W. A. grant and a loan from Reconstruction Finance Corporation, the city had made some improvements and had erected a grain elevator and docks on the tract which were served by the lines of Union Pacific and Missouri Pacific. The balance of the tract was available for a produce terminal. The establishment of such an instrumentality would obviously be of great benefit to the city in both financial and civic aspects. The plan evolved was that the city should erect such a terminal; that Union Pacific would construct a large team track and switching yard on the ground adjacent to the terminal to be leased by Union Pacific from the city and that the terminal should be financed by the city through a P. W. A. grant and income bonds.

De Oreo and Fean, Union Pacific, and the city officials all struggled earnestly to obtain a grant from P. W. A. An investigation by the Department of Agriculture disclosed that the terminal would be highly beneficial to the producers tributary to the Kansas City market. Investigation by the P. W. A. disclosed that the scheme was desirable and practicable. A grant of not to exceed $1,700,000 was made conditioned on the financing of the remainder of the project.

Union Pacific and the city officials negotiated witth an underwriting house for the sale, by the city, of $3,000,000 of income

bonds, $1,033,000 of which were to to be used to pay off the outstanding bonds, and the balance for the erection of the terminal. Although a firm commitment had been obtained the bond house, at the last moment, receded from the proposition thus leaving the whole project in jeopardy. In this situation Union Pacific asserted its willingness to buy the bonds. A bidding was held and Union Pacific was the successful bidder. No question is made of the legality of this investment by the railroad, and its intention to take the bond issue was approved by P. W. A. and was certified to the Interstate Commerce Commission. The city had no power to pledge its property and its general revenues as security for the bonds. It had full authority to issue income bonds, interest, and principal to be paid from the receipts of the terminal.[1]

The condition precedent to the P. W. A. grant having been fulfilled, the city proceeded with the erection of the terminal with the fullest aid and cooperation of Union Pacific. That company had advanced some $22,000 for preliminary expenses, which the city proposed to repay it. Under a ruling of P. W. A. the city could not do so with funds procured for construction and if the sum is repaid, the funds must come out of income. The railroad, not unnaturally, retained an architect to collaborate with the city's architect respecting the construction and exerted every effort to bring the plan to fruition.

In Kansas City, Missouri, there was an existing wholesale produce market. This needed extensive alterations and additions and the expectation was that many of the tenants would move to the new and more convenient terminal in Kansas City, Kansas. All who were interested in the latter realized that tenants of the old one in Missouri might incur expense in giving up their quarters and moving to the new. They realized also that, in order promptly to fill the new building, some concessions in the amount of early-accruing rentals might have to be made. An ice manufacturing and cold storage plant was part of the project. A tenant was obtained for this unit at a substantial rental. The city authorities negotiated an arrangement with the tenant for payment of some $80,000 in advance rental. With this money, and other advance rents it might obtain, the city felt that it could arrange to reimburse persons who might become tenants for losses incident to their removal. The question arose, however, as to the city's authority so

[1] State *ex rel.* Beck v. Kansas City, 149 Kan. 252; 86 P. (2d) 478.

to do. The matter was referred to a committee of lawyers and ultimately to the Attorney General of Kansas. That officer thought the matter should be settled by court decision. Accordingly a proceeding was instituted in the Supreme Court of Kansas and that court held the city had power, in the circumstances, to use advance rents in the manner proposed.[2]

As was expected, tenants of the old market in Missouri, when solicited to move to the new, raised questions of losses due to enexpired leases, abandonment of fixtures, etc. Everybody interested in the new terminal, including De Oreo and Fean, employes of Union Pacific, and representatives of the city, negotiated with these prospective tenants with respect of what would be a fair recompense for their losses due to removal and reestablishment. None of these negotiators had authority to do more than ascertain the claims of such proposed tenants which were to be submitted to, and adjusted by, a committee representing and acting for Kansas City, Kansas. The evidence is uncontradicted and overwhelming that Union Pacific's employes, and everyone else concerned, made it clear that any adjustment of these losses would have to be made by the city, and by the city only; that the railroad could not, and would not, pay a cent towards any such expense.

When this suit was brought nothing had been paid to any claimant. One claim had been approved by the committee. It turns out that although that claim was supported by affidavit it was in an unjustifiably large amount with respect to the cancellation of an existing lease but there is no evidence that the city officials, in approving the claim, knew this or would have approved the claim had they known it, and there is no finding that the claim was made in bad faith. Moreover, neither with respect to this claim nor to any other which was under consideration at the time suit was instituted is there evidence, and there is no finding by the court below or by this court, except by innuendo, that if the claims made were paid any payee would have even been made whole for losses consequent on moving and establishing himself in the new location, or that he would thereby have had any preference or advantage over other tenants to whom no such payments were made.

At an early day in the development of the project Union Pacific expressed its willingness to switch all consignments in and out of the terminal to and from other railroads at a uniform and fair

[2] State *ex rel.* Parker v. Kansas City, 151 Kan. 2; 98 P. (2d) 101.

charge. It filed a switching tariff with the Interstate Commerce Commission which has been accepted and is concurred in by the other railroads. The tariff is the same as that which has been in force for similar service in Kansas City, Missouri. Thus all railroads and shippers are to be served indifferently and at a uniform and fair rate for the transportation services involved.

On these facts the question is whether the actions of the railroad, those of the city, or those of the two jointly, constitute a rebate or a discrimination within the meaning of the Elkins Act.[3]

1. It has always been understood that one of the purposes of the interstate commerce law was to prevent a carrier from giving, and a shipper from receiving, transportation services at less than the published tariff rates, and to preclude what is equivalent, namely, the furnishing of a service at tariff rates to one shipper which is withheld from others. The sections of the Elkins Act here relied upon were merely intended to implement this Congressional aim and more efficiently to provide against evasion. Thus it is made unlawful for any person or corporation to offer, to grant, to give, or to solicit, to accept, or to receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate commerce by any common carrier subject to the Interstate Commerce Act, whereby any such property shall by any device whatever be transported at a less rate than the published tariff rate, or whereby any other advantage is given or discrimination is practiced. The language seems too clear to be misunderstood. It is only the carrier, or someone acting in its behalf, who can give or grant a concession. It is only the shipper, or someone acting in his behalf, who can receive or solicit one. The section as originally enacted goes on to provide: "Every person or corporation who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebate, concession or discrimination" shall be deemed guilty of a misdemeanor and punished by fine. As amended, it imposes a further punishment by fine or imprisonment upon any officer of a corporation or any person "acting for or employed by" any corporation, who is convicted of violating the provisions of the Act. Until the present time no one has supposed that a third party who is neither carrier nor shipper and neither furnishes nor receives transportation service, in making a business deal with a man who

[3] 49 U. S. C. § 41(1).

happens to be a shipper over an interstate carrier's line, may render himself liable criminally if, and merely because, the result of his transaction will be beneficial when reckoned up in the year's profit and loss statement of the other party to the transaction.

There seems to have been some question, although it is hard to understand why, whether the penal provisions of the Act applied to a shipper or his agents. When the Act was amended by the Hepburn Act the phrase "every person or corporation" was supplemented by an epexegetical clause "whether carrier or shipper". The legislative record shows that the amendment was intended to make sure that shippers who received rebates should be guilty equally with carriers who gave them. It had no other purpose.

Every decision applying the relevant provisions of the Interstate Commerce Act and the Elkins Act has turned upon the fact that someone furnishing a service of transportation covered by a tariff has remitted a part of the tariff charge, or has rendered a free service, or a service below cost to some shippers which others did not enjoy; and where one not a carrier has been held guilty of a violation of the Act it has been because he returned to the shipper through one performing a part of the transportation service covered by the carrier's tariff part of the published rate or has induced the carrier to perform a service for the shipper covered by the tariff at less than the published rate, or has induced the carrier to perform a transportation service for a shipper to which the shipper was not entitled under the published tariff and which, therefore, the carrier failed to perform for others.

The District Court, sensible of this unbroken line of authority, thought it necessary to attribute the proposed payments in some way to Union Pacific. To reach this result, it held that in the terminal enterprise Union Pacific and Kansas City were joint adventurers. Obviously the conclusion is incorrect. Union Pacific was in no sense a partner and did not stand to make a profit from the conduct of the enterprise. It was a lessee of a part of the property for its freight yard at an adequate rental. It was the owner of bonds lawfully acquired, and, as such, dealt at arm's length with the city. Although the Government seeks to sustain the conclusion of the District Court this court apparently discards it as unjustifiable.

In the second place, the District Court held that Union Pacific and the city were in a conspiracy to grant compensation to prospective tenants. But this is not equivalent to finding that the pur-

pose of the conspiracy was to grant transportation to these tenants at less than the tariff rates of Union Pacific. Inasmuch as it is conceded that there was no purpose to grant any shipper any service not granted to others, or to give any shipper a rebate from the published tariff rates, it seems plain that the latter sort of conspiracy is not made out.

Finally, the District Court sought to spell out a financial contribution by Union Pacific for the benefit of proposed tenants by what it denominated the waiver of the lien of the bonds held by the railroad on the terminal property. An examination of the decision of the Supreme Court of Kansas[4] makes it clear that, under the law of that State, the railroad had no lien, in any proper sense of the term. The state court held that the obligation of the city under the bonds was to devote the net profits of the enterprise to the payment of the principal and interest, but that it was at liberty to pay all necessary operating expenses, including the expenses of obtaining tenants. I do not understand that the opinion of this court approves the finding and conclusion of the District Court in this respect.

The ruling here is much broader, and does not condition violation of the law on any payment or concession by Union Pacific. It is that if the city, which is not a shipper, nor a carrier, and not a furnisher of any transportation service, in dealing with its own property not devoted to any service of transportation, sees fit to make an advantageous financial arrangement with a proposed tenant of its property that transaction, otherwise legal, at once becomes illegal and subjects the city, or its officers, to criminal penalties and to an injunction if it happens that the party with whom it deals becomes, in virtue of the transaction, a shipper over the lines of an interstate carrier, and is benefitted by the transaction. The distinction sought to be made between benefits applicable to transportation and benefits generally seems to me illusory. The court expressly holds that intent is immaterial; that if the result is advantageous to the shipper a rebate, concession, or discrimination from the tariffs of the carrier has been accomplished within the meaning of the Elkins Act.

I venture to think that no one will be more surprised than the members of the Congress at the attribution to the statutory phrase "every person" who gives or receives, grants or solicits rebates or

[4] Note 2, *supra*.

discriminatory service to states and municipal corporations and their officers who, in promoting lawful municipal purposes, incidentally bring additional business to an interstate carrier. We know that it is a common practice for chambers of commerce and city authorities to offer to manufacturing and business concerns lands and sites on favorable terms, such as low purchase price, reduced rentals, exemption from taxation for a given period, in an effort to induce such concerns to locate within the limits of a municipality.

We know that, in order to induce men to move their plants from one location to another, it is a practical necessity to offer them some recompense for the expense involved and for the loss which may result from doing business in a new location. Under the decision now announced, citizens or city officials connected with such a transaction, though their purpose be wholly remote from any benefit to a railroad, are guilty of a criminal offense.

We also know that in the competitive effort of railroads to obtain business they have assisted municipalities to establish industries along their lines. It has never been thought that such activity on the part of the railroad, where it gave nothing in money and rebated nothing from its published tariffs in service or rates, constituted a violation of the Elkins Act. To hold that, by this statute, Congress intended to paralyze lawful effort, well within the powers conferred by the states on their municipalities, in the view that such effort constitutes a rebate from a carrier's tariff rate, seems to me to place a forced and unreasonable construction upon the words of the Act.

The opinions of the court below and of this court point out that, as a result of the consummation of the plan for a terminal, Union Pacific expected to carry greatly increased traffic into and out of Kansas City and that this increase necessarily would inflict losses upon its competitors. But the Elkins Act and the Interstate Commerce Act, were aimed at specific abuses, and were not general prohibitions of all forms of competition between carriers or limitations on the increase of a carrier's traffic by any sort of competition. In fact the Congressional policy is to foster and encourage competition between railroads, and to prohibit agreements or conspiracies to suppress it.[5] It is common knowledge that carriers customarily advertise the advantages of sites lying along their lines in the hope

[5] United States v. Trans-Missouri Freight Association, 166 U. S. 290, 312, 325.

of encouraging shippers to locate thereon. It seems to me that the circumstance so pointedly noticed is irrelevant to any question involved in this case. Of course, Union Pacific was actuated by the legitimate desire of increased traffic in all its efforts towards the establishment of the terminal. That avowed motive was, in my judgment, innocent and lawful. Moreover, in truth, this controversy has its roots in the competition of two cities, rather than that of railroads.

2. Assuming, as the opinion does, that the city and its officers were, within the meaning of the Act, persons "acting for" Union Pacific, the proof fails to disclose that the sum proposed to be paid to any produce merchant in connection with his moving to the new terminal was in fact more than fair compensation for loss or was a discrimination against any other tenant. There is no proof, and indeed it would be very difficult to furnish any, that at the end of one, two, or three years of business at the new terminal,—considering the attendant expense of moving and reestablishing the business at the new location, the incident loss of good will and custom, and the necessity of finding new custom to take the place of that lost,—the balance sheet of any of the tenants would disclose that he was better off than if he had stayed in his old location. And it would be even more difficult to determine that a sum paid him to cover such loss and damage is reflected upon his books in the transportation charges paid by him, rather than in the other items of expense connected with his business. How shall any such allocation be made? None such is necessary where the carrier itself, or someone representing it, grants a concession from the published rate or renders a service not comprehended in its tariff. In such case the fact speaks for itself. In this case the court assumes the fact and, by a blanket and sweeping decree, bans any compensation, however just, to anyone for removing from an old location to the new terminal on the suspicion that the payee may have some advantage over another tenant who did not incur any such expense. Thus the decree will render it impossible for Kansas City to make what it deems legitimate and proper arrangements for the prosecution of a business enterprise in no sense consisting of the service of transportation. It seems clear that Congress never had any such intent in adopting the Elkins Act. This is to reach into the peculiarly local affairs of the states and to lay the dead hand upon the otherwise lawful activities of states and their subdivisions. Cer-

tainly a far more specific mandate should be required to persuade us that Congress had any such purpose.

3. Another feature of the decree seems to me to be equally unjustified. The record discloses that the city adopted a standard form of lease which fixed a uniform rental per unit of space. In order to fill the building promptly this lease provided that for the first three months the monthly rental should be one-third of the standard monthly rental. Thus a tenant who, after the three months, would pay $150 a unit would get the use of that unit for the first three months for $50. It is again common knowledge that, in a competitive situation, the owner often has to make rental concessions for a brief time at the beginning of the lease term. There is nothing unlawful about this and the decision of the Supreme Court of Kansas sanctions it. The court below swept aside all these arrangements and, although it found "the present rental rates and the consequent return to the City are not so low that the use of the Food Terminal by tenants in interstate commerce at those rentals will amount to a gift of any part of the value of the use of the Food Terminal to the tenant shippers", it nevertheless required that the rentals must be such as to allow a fair return to the city on the total value of the premises including the product of the money granted by P. W. A. and the land acquired by free gift. Under the law, the city was at liberty to turn this land to account in such manner and at such rate of return as it might see fit. While the opinion of the court holds this provision of the decree erroneous, it substitutes what I think an equally improper rule. The city is to be prohibited from leasing its own publicly owned property, in the prosecution of an enterprise which it deems benecial to the community, at rates it deems proper and rates which are otherwise within its lawful power. It is told that it must get a fair rental value and various criteria of fairness are suggested. Thus, the court holds, that Congress intended in such a situation to shackle the municipal arm of a sovereign state, for the indefinite future, and compel it to conduct its business contrary to what the law of its own state permits. This result cannot be justified in the guise of preventing an alleged rebate of tariff rates by a carrier unconnected with, and neither controlled by the city nor exerting any legal control over the city, whose only function is that of serving those who use the city's facilities.

I am of opinion that the bill should have been dismissed.

Mr. Justice BLACK and Mr. Justice DOUGLAS join in this opinion.